Supreme Court, U.S.
FILED
OCT 24 2008
OFFICE OF THE CLERK

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No. 08-548

IN THE

Supreme Court of the United States

ALLTEL COMMUNICATIONS, LLC,

Petitioner,

v.

CITY OF SPRINGFIELD, MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tax Injunction Act ("TIA") provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. In *Jefferson County v. Acker*, 527 U.S. 423 (1999), this Court determined that the TIA did not bar a local tax authority from pursuing a tax collection action in federal court against federal officers where (1) the federal officers removed the action from state to federal court; and (2) the issue presented was whether federal law barred the enforcement of a local occupational tax. Since *Acker* was decided, lower federal courts have disagreed whether the holding of *Acker* is limited in whole or in part to the unusual circumstances of that case, or whether the TIA permits the assertion of federal jurisdiction whenever a state or local tax authority brings suit. The Eighth Circuit below adopted the latter view.

The Court should grant certiorari to resolve the following questions:

1. Following *Acker*, may federal courts adjudicate claims brought by tax authorities regarding the validity and meaning of disputed tax provisions under state and local law, notwithstanding that a ruling in favor of the taxpayer would "enjoin, suspend or restrain the assessment, levy or collection of [the] tax under State law"?

2. If *Acker* continues to be read for the proposition that the TIA is inapplicable whenever a state or local tax authority is the plaintiff, should the Court revisit and confine *Acker* on the grounds that the recognition of such a broad exception to the TIA is irreconcilable with the plain language and purpose of the statute, and opens the floodgates to federal diversity actions regarding the validity and meaning of tax provisions under state and local law?

PARTIES TO THE PROCEEDING

In addition to Alltel Communications, LLC, Cingular Wireless LLC and Southwestern Bell Wireless, LLC were appellants in the court of appeals. The City of Springfield, Missouri, was an appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Alltel Communications, LLC is a wholly owned subsidiary of Alltel Corporation. Alltel Corporation is a privately owned entity. On June 5, 2008, Verizon Wireless entered into an agreement to acquire Alltel Corporation in a cash merger pending regulatory approvals. After consummation of the proposed transaction, Alltel Corporation will be a direct, wholly owned subsidiary of AirTouch Cellular and an indirect, wholly owned subsidiary of Verizon Wireless. Verizon Wireless is a joint venture of Verizon Communications and Vodafone.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alltel Communications, LLC ("Alltel") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at 531 F.3d 595. App. 1a. The order denying the petitions for rehearing is unreported. App. 143a. The decisions of the United States District Court for the Western District of Missouri are also unreported. App. 44a-142a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its decision on July 3, 2008, App. 2a, and denied a timely petition for rehearing filed by Alltel on August 27, 2008, App. 144a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked under 28 U.S.C. § 1332.

PERTINENT STATUTES AND ORDINANCES INVOLVED

The Tax Injunction Act, 28 U.S.C. § 1341, provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Anti-Injunction Act, 26 U.S.C. § 7421, provides in pertinent part: "Tax.—Except as [otherwise] provided in [Title 26] . . . , no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." *Id.* § 7421(a).

The Johnson Act, 28 U.S.C. § 1342, provides: "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where: (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and, (2) The order does not interfere with interstate commerce; and, (3) The order has been made after reasonable notice and hearing; and, (4) A plain, speedy and efficient remedy may be had in the courts of such State."

Section 70-452 of the City of Springfield, Missouri Code of Ordinances provides: "Every person engaged in the business of supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city shall pay as a license tax a sum equal to six percent of the gross receipts from such business."

STATEMENT OF THE CASE

A. Factual Background

This case arises out of a dispute over the validity and meaning of a municipal tax ordinance under state and local law. In 2000, the City of Springfield, Missouri (the "City") adopted an ordinance (the "2000 Ordinance" or the "Ordinance") that imposes a six-percent tax on the gross receipts of any business "supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city." Springfield Code of Ordinances § 70-452. The 2000 Ordinance is an amended and recodified version of gross receipts ordinances dating back to World War II that applied only to "telephones and telephonic service," not "telecommunications and telephonic service."

Petitioner Alltel is a leading provider of commercial mobile radio services ("CMRS"), or cell phone services, throughout the United States, and offers cell phone services to customers in Springfield. On April 14, 2004, approximately four years after the 2000 Ordinance was adopted, the City retained outside counsel and sent letters to Alltel and other CMRS providers demanding payment by April 29, 2004, of back taxes purportedly due under the 2000 Ordinance and its predecessor. Alltel refused to pay the gross receipts taxes demanded by the City.

B. Proceedings Below

Following Alltel's refusal, the City chose not to follow its mandatory assessment and collection procedures set forth in the Springfield Code, *see* Springfield Code of Ordinances §§ 70-151 to -157. Instead, the City filed a diversity action in the United States District Court for the Western District of Missouri. As originally framed, the City's complaint stated only a collection claim against Alltel, several other CMRS providers, and one wireline provider for back taxes, penalties, and interest allegedly due and owing. Approximately one year after the City brought suit, the federal case was stayed while the Missouri courts considered and ultimately sustained the City's state-court challenge to a 2005 Missouri statute (HB 209) that the Missouri Legislature had adopted for the express purpose of prohibiting local tax collection suits against telecommunications providers. *See, e.g.*, *City of Springfield v. Sprint Spectrum L.P.*, 203 S.W.3d 177, 179-80 (Mo. 2006).

After further proceedings in the district court, on February 7, 2007, the City was granted leave to file a Second Amended Complaint adding a claim for "a declaratory judgment pursuant to 28 U.S.C. § 2201 *as to the validity and applicability* of the Ordinance ...." App. 170a (emphasis added). According to the City's Second Amended Complaint, the City added the declaratory judgment claim because Alltel and other CMRS providers had challenged not only "the applicability of the Ordinance to their particular 'Commercial Mobile Radio Services,'" but also "the City's authority to enact and enforce the Ordinance." App. 160a. The Second Amended Complaint thus stated

three claims for relief: (1) a collection claim against Alltel and other CMRS providers for having "failed to remit taxes due and owing the City of Springfield for the past five (5) years and continuing," App. 166a; (2) a declaratory judgment claim against Alltel and other CMRS providers requesting rulings that the "Springfield Ordinance, which includes the terms 'telephone' and 'telephonic' applies to the Wireless Defendants' services" and that "the Wireless Defendants [are] liable to pay taxes under the Ordinance," App. 170a; and (3) a collection claim against a wireline carrier (not at issue here), App. 167a.

In response to the Second Amended Complaint, Alltel filed an answer and contingent counterclaim[1] as well as a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In its motion to dismiss, Alltel argued that, consistent with the mandatory collection procedures set forth in the City Code, an unbroken line of controlling Missouri Supreme Court decisions dating back to the nineteenth century, and the Tax Injunction Act ("TIA"), the City was barred from pursuing its collection and declaratory judgment claims in federal court. In the alternative, Alltel opposed the City's collection and declaratory judgment claims on the merits, arguing that the 2000 Ordinance was invalid on the grounds that CMRS constitutes a "telecommunications" service, not a "telephone" service, the City is not authorized to tax

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[1] Without waiver of its position that the district court lacked jurisdiction, Alltel asserted a contingent counterclaim for declaratory judgment and attorneys' fees to preserve its rights in the event the district court entertained jurisdiction over the City's Second Amended Complaint in whole or in part. Doc. 459.

CMRS providers under the City of Springfield Charter, and the City's attempt in 2000 to expand the reach of the gross receipts tax without obtaining voter approval violated the Missouri Constitution. Docs. 457-458.

The district court dismissed the City's tax collection claim without prejudice under Fed. R. Civ. P. 12(b)(6), holding at least implicitly that the City's collection claim was not ripe under controlling Missouri law because the City had failed to comply with its own mandatory and exclusive tax assessment and collection procedures. App. 70a-76a. The district court refused, however, to dismiss the City's separate claim for declaratory relief. App. 76a-89a. As to that claim, the district court agreed with Alltel that Missouri's exclusive tax remedy doctrine as currently articulated by the Missouri Supreme Court would bar a Missouri court from exercising subject matter jurisdiction, but determined that the Missouri Supreme Court would approve previously unrecognized exceptions to the jurisdictional bar in order to entertain the City's declaratory judgment claim regarding the validity and meaning of the 2000 Ordinance. App. 77a-79a, 106a, 110a. Although Alltel argued that the Tax Injunction Act also barred the City's declaratory judgment claim, Doc. 458 at 11 n.10, the district court did not rule on the TIA's applicability. Having thus rejected or ignored Alltel's jurisdictional objections, the district court reached the merits of the City's claim for declaratory relief, rejected Alltel's challenge to the validity of the 2000 Ordinance under the Missouri Constitution and the Springfield City Charter, and ruled that the Ordinance is "enforceable and that it applies to cell phone services just as it applies to land line telephone services." App. 45a.

On appeal, the Eighth Circuit affirmed the district court's award of declaratory relief to the City.[2] In pertinent part, the Eighth Circuit rejected Alltel's argument that the exercise of federal subject matter jurisdiction over the City's declaratory judgment claim was barred by the TIA, reasoning that "neither the text of § 1341 nor the relevant Supreme Court holdings compel such a result." *City of Jefferson City, Missouri v. Cingular Wireless LLC*, 531 F.3d 595, 604 (8th Cir. 2008). Although the court acknowledged that the TIA ordinarily bars declaratory judgment actions to adjudicate the validity of a state tax, *id.* at 603, the Eighth Circuit broadly construed this Court's decision in *Jefferson County, Alabama v. Acker*, 527 U.S. 423 (1999), to endorse the propositions that the jurisdictional bar in the TIA is inapplicable when (1) the tax authority is the plaintiff; and (2) the dispute concerns "the application of the tax" rather than the tax authority's "'right' or 'power' to tax." *City of Jefferson City*, 531 F.3d at 604. As the Eighth Circuit phrased it, "there is a crucial distinction between a plaintiff who seeks a declaratory judgment that a specific tax is unconstitutional or invalid and a plaintiff who seeks a declaratory judgment that a particular taxpayer is engaged in an activity that makes the taxpayer subject to a state or local tax." *Id.* (citing *Hibbs v. Winn*, 542 U.S. 88, 104 (2004), and *Acker*, 527 U.S. at 433-35). Reasoning that the City had brought the declaratory judgment claim and further asserting (erroneously) that the City was not seeking a ruling on "whether the tax is

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[2] The City did not appeal the district court's dismissal of its collection claim.

valid,"[3] the court held that the City's "claim for declaratory judgment was not barred by § 1341 because it was not a claim by a taxpayer seeking to prevent tax collection proceedings." *Id.* Like the district court, the Eighth Circuit then reached the merits of the City's declaratory judgment claim, rejected Alltel's argument that the 2000 Ordinance was invalid under the Missouri Constitution and the Springfield City Charter, and held that CMRS constitute "telephonic service" within the meaning of the Ordinance. *Id.* at 605.

Alltel and Cingular Wireless LLC each filed timely petitions for rehearing, which were denied.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision to render a declaratory judgment on the validity and meaning of a local tax ordinance adopted by the City of Springfield, Missouri—notwithstanding the district court's dismissal of the City's collection claim consistent with controlling Missouri state law—reflects an expansive reading of this Court's holding in *Acker* on an issue that has divided the lower federal courts. Moreover, the decision below threatens to embroil the federal judiciary with increasing frequency in core disputes regarding the

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[3] The Eighth Circuit's assertion that the City was not seeking a declaration regarding the validity of the tax was plain error, because the City's claim for declaratory relief requested a ruling on the validity of the tax, App. 170a. Furthermore, in awarding the City declaratory relief, both the district court and the Eighth Circuit expressly *rejected* the wireless carriers' arguments that the 2000 Ordinance was *invalid*. *City of Jefferson City*, 531 F.3d at 611-14.

validity and meaning of state and local tax laws. Accordingly, the Court should grant certiorari to resolve two issues:

First, following this Court's decision in *Acker*, is the categorical prohibition in the TIA on the exercise of federal subject matter jurisdiction over claims "to enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" inapplicable whenever a state or local tax authority brings suit to obtain a federal declaration or similar relief regarding the validity and meaning under state law of a state or local tax, notwithstanding that a ruling in favor of the taxpayer would effectively "enjoin, suspend or restrain" the tax?

Second, if *Acker* continues to be read for the proposition that the TIA is *never* a bar to a federal action initiated by a tax authority to determine the validity and meaning of state and local tax laws, should the Court revisit and confine *Acker* on the grounds that the recognition of such a broad exception to the TIA is irreconcilable with the plain language and history of the statute, and threatens to open the floodgates to federal diversity actions to determine the validity and meaning of tax provisions under state and local law, issues that traditionally have been reserved to the states?

As set forth more fully below, the Eighth Circuit's decision that the TIA does not deprive federal courts of jurisdiction to adjudicate a tax authority's declaratory judgment claim regarding the validity of tax provisions under state and local law embraces a broad reading of *Acker* that is inherently flawed and irreconcilable with

the plain language of the statute and this Court's decision in *California v. Grace Brethren Church*, which held that the Act prohibits the exercise of jurisdiction over suits for "declaratory as well as injunctive relief," 457 U.S. 393, 408 (1982). Contrary to the Eighth Circuit's analysis, the application of the TIA to a declaratory judgment action regarding the validity and meaning of a tax provision under state and local law should not turn on whether the action is brought by the tax authority or the taxpayer.

There is no support for drawing this distinction in the language of the statute. In addition, regardless of whether suit is brought by the tax authority or the taxpayer, the enforceability of the tax is at issue, federal interference with state and local tax regimes is threatened, and on the face of the pleadings it is as likely as not that the federal court's decision will arrest the state assessment and collection process. To assume jurisdiction over a tax authority's declaratory judgment claim regarding the validity of a state or local tax under state law is to acknowledge, perforce, that the tax authority might lose, and is also incompatible with the settled rule that federal subject matter jurisdiction should be construed narrowly, particularly in cases that concern subjects—like state and local taxation—that traditionally have been left to state courts. *See, e.g.*, *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (noting the "traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108 n.6 (1981) (stating that the "special reasons justifying the policy of federal noninterference with state tax collection are obvious" (quotation omitted)).

Lower federal courts are divided as to whether this Court's decision in *Acker*—which held that the TIA did not bar a municipal suit in federal court against federal officers to collect a local occupational tax over a federal defense—extends to federal *declaratory relief* claims brought by tax authorities that present tax issues arising under *state and local law*. Left undisturbed, the decision below portends a massive shift from state to federal courts of responsibility for determining the validity and meaning of state and local tax laws. Moreover, the decision below threatens to put federal courts between warring state agencies and instrumentalities on issues of tax law and policy. For example, in a parallel state-court proceeding directly related to this case, the City of Springfield challenged the legality, under the Missouri Constitution, of a 2005 Missouri statute (HB 209) that purported to extinguish the City's right to sue CMRS providers for back taxes. *City of Springfield v. Sprint Spectrum L.P.*, 203 S.W.3d 177 (Mo. 2006). Though that dispute was ultimately resolved by the Missouri state courts, nothing in the Eighth Circuit's ruling would prevent a federal court from assuming jurisdiction in such a tax case and ruling in favor of one state agency or instrumentality over another; indeed, before the constitutionality of the 2005 Missouri state statute was resolved in state court, the City asked the district court to hold the 2005 state tax statute unconstitutional. Doc. 250.

Moreover, extending *Acker* to declaratory judgment actions not only invites federal court intrusion on core questions of state tax law and policy, but it opens a huge breach in the TIA. Because *Acker* involved a tax collection action that was removed from state court to

federal court, an expansive reading of *Acker* invites removal whenever the diversity requirements of 28 U.S.C. § 1332 are satisfied. Thus, the Eighth Circuit's decision encourages taxpayer defendants in state court tax actions to sidestep the TIA by removing those cases to federal court.

I. The Court Should Grant Certiorari To Clarify Whether, Following *Acker*, The Tax Injunction Act Bars A Tax Authority From Seeking A Federal Declaratory Judgment Regarding The General Validity And Applicability Of State And Local Tax Laws.

The Tax Injunction Act prohibits a federal court from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.[4] As this Court has observed, and as the plain language of the statute reflects, "[t]he Tax Injunction Act is grounded in the need of States to administer their fiscal affairs without undue interference from federal courts," *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 832 (1997), and "[t]he federal balance is well served when the several States define and elaborate their own [tax] laws through their own courts and administrative processes and without undue interference from the Federal Judiciary," *id.* at 826. Consistent with these principles, this Court "has interpreted the Tax Injunction Act quite broadly, such that federal district

[4] For purposes of applying the TIA, "[s]tate taxation . . . includes local taxation." *Hibbs*, 542 U.S. at 100 n.1.

courts are now virtually precluded from hearing any state or local tax suit." Bradley W. Joondeph, *Exploring The "Myth Of Parity" In State Taxation: State Court Decisions Interpreting Public Law 86-272*, 13 Wash. U. J.L. & Pol'y 205, 206 (2003) (citing *Grace Brethren*, 457 U.S. at 411). In particular, the Court has held that the TIA bars not only suits that seek to "enjoin" state and local tax laws, but also suits seeking declaratory relief that would have the same practical effect. *See Grace Brethren*, 457 U.S. at 408.

A. *Acker* Is A *Sui Generis* Case That Produced A Holding Of Doubtful Correctness And Uncertain Breadth.

In *Acker*, Jefferson County, Alabama sought to enforce an occupational tax ordinance against two federal judges who held court within the County. 527 U.S. at 429. The judges claimed that they were shielded from any obligation to pay the tax by federal law and argued, among other things, that the ordinance constituted a licensing scheme that did not qualify as a permissible tax under the Public Salary Tax Act, 4 U.S.C. § 111.

The County brought suit in state court to collect the tax, and the federal judges removed the County's collection suit to federal district court under the federal officer removal statute, 28 U.S.C. § 1442. After this Court held that the judges were entitled to remove the case under Section 1442, the Court confronted a conflict presented by the TIA: Notwithstanding that the defendant judges had an unqualified, statutory right to removal, did the TIA negate the assertion of federal

jurisdiction over the County's collection claim on the ground that, in defense of the action, the judges were seeking to "enjoin, suspend, or restrain the assessment, levy or collection of [the] tax under State law"? 28 U.S.C. § 1341.

For reasons that are not clear, the TIA issue presented by the County's collection action in *Acker* was not resolved narrowly on the basis of the exception set forth in the TIA itself, which provides that the prohibition imposed by the statute does not apply when "a plain, speedy and efficient remedy may [not] be had in the courts of [the] State," 28 U.S.C. § 1341. In the unusual circumstances of *Acker*, the federal officer removal statute—which conferred an unqualified right on the judges to remove the case to federal court—arguably rendered the Alabama courts unavailable to resolve a tax dispute involving federal officers. *See, e.g.*, *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (holding that "the right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act 'under color' of federal office"). Moreover, "[h]ad the plaintiffs in [*Acker*] been barred from suit [by the TIA], there would have been no available forum at all for their claims." *Hibbs*, 542 U.S. at 120 (Kennedy, J., dissenting); *id.* at 108 n.10 (majority opinion) ("The [TIA] requires the State to provide taxpayers with a swift and certain remedy when they resist tax collections." (emphasis omitted)).

Instead, the Court chose to resolve the TIA issue by holding that the TIA "does not bar collection suits, nor does it prevent taxpayers from urging defenses in [collection] suits that the tax for which the collection

sought is invalid." *Acker*, 527 U.S. at 435. Since *Acker* was decided almost ten years ago, the foregoing statement has generated considerable confusion in the lower courts.

First, it is unclear whether the Court's holding in *Acker* is narrowly confined to "collection" actions that do not implicate the validity or meaning of a tax *under state or local law*, or whether *Acker* is intended to state a general rule that the TIA is inapplicable to *any* tax suit initiated by a state or local tax authority, regardless of the relief requested, regardless of whether the relief requested ultimately turns on the application of federal or state law, and regardless of whether the case is originally brought in federal court or (as in *Acker*) removed from state court to federal court by the defendant. The narrower reading of *Acker* is supported by the facts that the case arose in highly unusual circumstances and did not involve a challenge to the general validity or applicability of the Jefferson County, Alabama ordinance as a matter of state or local law. Rather, the case involved a challenge to a *unique* application of the County ordinance to federal officers based on *federal* law. Furthermore, though the Court in *Acker* appeared to emphasize that the intrusive potential of a collection suit was minimal, *see id.* at 440 ("Jefferson County has done no more than institute a collection suit"),[5] the Court cited its prior decision in

[5] A collection action arguably threatens minimal interference with state tax administration because, typically, the validity of the disputed tax and the amount of the assessment are either not at issue or have been determined previously. *See, e.g., City of Philadelphia v. Opinion Dynamics*

(Cont'd)

Grace Brethren approvingly for the proposition "that declaratory relief falls within the [TIA]'s compass." *Id.* at 433 (citing *Grace Brethren*, 457 U.S. at 408).[6]

Second, if the holding of *Acker* is construed broadly for the proposition that the TIA has no application whatsoever to a suit initiated by a state or local tax authority, it is not only irreconcilable with the text and purpose of the statute for the reasons set forth below, but in tension with *Grace Brethren*'s holding that the TIA "prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional."

(Cont'd)

Corp., 185 F. Supp. 2d 442, 443 & n.1 (E.D. Pa. 2002) (noting that the City filed a collection action to obtain a fixed amount). In this case, however, there is no collection claim to support the exercise of federal jurisdiction, because the City's collection claim was dismissed on the ground that it was barred by a Missouri rule of administrative exhaustion. Furthermore, in contrast to *Acker*, in this case the City affirmatively invited the federal court to rule on the validity of the 2000 Ordinance under state law.

[6] In holding that the TIA does not prohibit "taxpayers from defending suits brought by a government to obtain collection of a tax," 527 U.S. at 435, *Acker* criticized the Second Circuit's conclusion in *Keleher v. New England Telephone & Telegraph Co.*, 947 F.2d 547 (2d Cir. 1991), that the "[Congress] necessarily intended for federal courts to abstain from hearing tax enforcement actions in which the validity of a state or local tax might reasonably be raised as a defense." *Acker*, 527 U.S. at 434 (quoting *Keleher*, 947 F.2d at 551). However, it is not clear whether the Court's criticism reflected a concern that *Keleher* left no room for *collection* actions, or whether the Court disagreed with the proposition that the TIA applies to government-initiated actions at all.

457 U.S. at 408. As the Court reasoned in *Grace Brethren*, the TIA prevents a federal court from placing itself in a position to issue declaratory relief that threatens to interfere with the administration of state tax laws: "[T]he Act divests the district court not only of jurisdiction to issue an injunction enjoining state officials, but also of jurisdiction to take actions that 'suspend or restrain' the assessment and collection of state taxes." *Id.*; *see also id.* at 408 n.22 (stating that the TIA "divest[s] the federal courts of jurisdiction to interfere with state tax administration"). A contrary conclusion would "defeat[] the principal purpose of the Tax Injunction Act: 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Id.* at 408-09 (quoting *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981)).

B. Lower Federal Courts Are Divided Over The Scope And Application Of *Acker*.

Though state and local governments have generally been allowed to bring *collection* actions in federal court after *Acker*, *see, e.g.*, *City of Philadelphia*, 185 F. Supp. 2d at 444; *Sch. Bd. of Parish of St. Charles v. Quala Sys., Inc.*, 159 F. Supp. 2d 295 (E.D. La. 2001), lower courts are divided regarding the application of *Acker* to *declaratory judgment* actions brought by tax authorities. For example, in *Orange County v. Expedia, Inc.*, 440 F. Supp. 2d 1341 (M.D. Fla. 2006), the County sought a declaratory judgment regarding its "power, privilege and right" to tax the sale of hotel accommodations in the county. *Id.* at 1343. Distinguishing the County's suit from the collection

action authorized in *Acker*, the district court held that the TIA barred the County's declaratory judgment action. *Id.* at 1343-44. Prior to *Acker*, other federal courts reached similar conclusions. *See City of Burbank v. Nevada*, 658 F.2d 708, 709 (9th Cir. 1981) (TIA barred declaratory judgment claim by California municipalities against sister State); *City of Chattanooga, Tenn. v. Bellsouth Telecomm., Inc.*, 1 F. Supp. 2d 809 (E.D. Tenn. 1998) (holding that the TIA barred city's declaratory judgment action seeking a ruling that a city ordinance required telecommunications providers to pay an application and franchise tax); *Edwards v. Transcon. Gas Pipe Line Corp.*, 464 F. Supp. 654, 659 (M.D. La. 1979) (holding that the TIA barred a declaratory judgment action brought by the Governor, Attorney General, and Secretary of Revenue and Taxation seeking a ruling on the validity of the state's use tax on natural gas because "[t]his case involves no special circumstances whatsoever to indicate that it should fall outside of the Tax Injunction Act").

By contrast, in *Mayor & City Council v. Vonage America Inc.*, 544 F. Supp. 2d 458 (D. Md. 2008), the district court held that the TIA did not bar the City of Baltimore's declaratory judgment action seeking a ruling that a telecommunications tax applied to a provider, but did bar the provider's *counterclaim* seeking a declaratory judgment that it was not subject to the tax. *Id.* at 461. The district court then proceeded to render this distinction moot by concluding that the "court has jurisdiction over both the City's claim for declaratory judgment" and—notwithstanding its dismissal of the provider's counterclaim—"the defenses Vonage asserts opposing the applicability of the City's

Telecommunications Tax." *Id.* at 466. Still other courts that have not squarely addressed the issue have noted the confusion precipitated by *Acker*. *See Quala Sys., Inc.*, 159 F. Supp. 2d at 299 ("This Court cannot discern the difference in the federal courts abstaining in an injunction context and adjudicating in a collection context. Nonetheless, the Court is bound to follow *Jefferson County* and thus the ruling rendered herein.").

By adopting the reasoning of the *Vonage* court, the Eighth Circuit aligned itself with courts that have held the TIA does not bar a declaratory judgment claim initiated by a tax authority. *City of Jefferson City*, 531 F.3d at 604. The Eighth Circuit's analysis, however, evinces substantial confusion. For example, though the Eighth Circuit relied upon *Acker* in an attempt to draw a distinction between "a plaintiff who seeks a declaratory judgment that a specific tax is unconstitutional or invalid" and "a plaintiff who seeks a declaratory judgment that a particular taxpayer is engaged in an activity that makes the taxpayer subject to a state or local tax," *id.*, the "validity" of the 2000 Ordinance is squarely at issue in this case, and in either scenario the tax authority could be "enjoin[ed]" or "restrain[ed]" by a federal court from securing tax revenues within the meaning of the TIA. Similarly, in light of the Eighth Circuit's broad reading of *Acker*—and the court's express acknowledgement that *Acker* involved a collection claim that was removed to federal court by the defendant taxpayers, *see id.*—nothing in the Eighth Circuit's decision would prevent *state-court* defendants from evading the TIA by removing those cases to federal court if they can establish diversity.

This case represents a clear opportunity for the Court to address the implications of *Acker* and the applicability of the TIA to conventional declaratory judgment and similar actions brought by state tax authorities regarding the validity of state and local tax provisions under state and local law. Here, the Eighth Circuit permitted the City to circumvent the TIA and *Grace Brethren* and seek "a declaratory judgment pursuant to 28 U.S.C. § 2201 as to the *validity and applicability* of the Ordinance." App. 170a (emphasis added).[7] Though the Eighth Circuit sustained the validity of the 2000 Ordinance, it nonetheless intruded on the administration of state and local tax laws by rejecting the wireless carriers' argument that the Ordinance violated the Missouri Constitution and the Springfield City Charter. The administrative chaos precipitated by the Eighth Circuit's decision is manifest because, given the district court's prior dismissal of the City's collection claim, the Eighth Circuit effectively bifurcated the merits of the wireless carriers' dispute with the City between the federal and state court systems.

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[7] As set forth above, *see supra* note 3, in an apparent effort to shoehorn this case within the fact pattern considered in *Acker*, the Eighth Circuit misstated the nature of the relief sought by the City as a request for a declaratory judgment regarding only the *applicability* of the Ordinance. *City of Jefferson City*, 531 F.3d at 599 ("Count III sought a declaratory judgment that the tax ordinance *applies* to the defendants." (emphasis added)).

II. If *Acker* Is To Be Read Broadly For The Proposition That The Tax Injunction Act Is Inapplicable Whenever A State Or Local Tax Authority Brings Suit, The Court Should Revisit That Holding And Confine *Acker* Accordingly.

A. The Eighth Circuit's Determination That The Tax Injunction Act Allows Federal Courts To Adjudicate Declaratory Judgment Claims Regarding the Validity And Meaning Of Tax Provisions Under State And Local Law Whenever A Tax Authority Brings Suit Is Irreconcilable With The Letter And Purpose Of The Tax Injunction Act.

The plain language of the TIA is inconsistent with the Eighth Circuit's conclusion that application of the TIA's jurisdictional bar depends on the identity of the plaintiff, and that the bar applies only when a claim is brought by a taxpayer. *See City of Jefferson City*, 531 F.3d at 604. As this Court has held, "[t]he statute, on its face, yields no exception to the jurisdictional bar save where the state remedy is wanting." *Farm Credit Servs.*, 520 U.S. at 823. Instead, the prohibition in the TIA turns on the potential consequences of the relief sought by the plaintiff: federal courts are divested of jurisdiction if (1) adjudication of the claim *could* require the court to suspend or restrain the collection of local taxes; and (2) a plain, speedy and efficient remedy is available in state courts. 28 U.S.C. § 1341. Indeed, the Court has repeatedly made plain that the relief requested by the plaintiff—and the possible implications of the plaintiff's request for relief—are the central inquiries in determining whether the TIA applies. *See*

Hibbs, 542 U.S. at 99 ("To determine whether this litigation falls within the TIA's prohibition, it is appropriate, first, to identify the relief sought."); *id.* at 119 (Kennedy, J., dissenting) ("The TIA's language bars this relief and so bars this suit.");[8] *see also Fair Assessment*, 454 U.S. at 184 (considering whether "the relief sought in this case would have a similarly disruptive effect" as injunctive relief). The Eighth Circuit's conclusion that application of the TIA turns

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[8] In 2004, in a closely divided 5-4 opinion, this Court discussed the legislative history of the TIA at length in holding that the TIA did not bar a federal suit brought by Arizona taxpayers that challenged the constitutionality, on federal Establishment Clause grounds, of tax credits conferred on others for contributions made to fund private school tuition. *Hibbs v. Winn*, 542 U.S. 88 (2004). Though the Court fell short of resolving the issue presented by this case, the majority and the dissenting opinions sharply disagreed on whether the TIA is concerned solely with federal interference with a tax authority's attempt to *collect* taxes, or whether the TIA is more broadly concerned with *any* federal interference in the administration of state and local taxes. *Compare, e.g., id.* at 104-105 (majority opinion) ("[I]n enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the tax authority.") *with id.* at 125 (Kennedy, J., dissenting) ("The TIA protects the responsibility of the States and their courts to administer their own tax systems and to be accountable to the citizens of the State for their policies and decisions."). Under either the majority or dissenting views of the TIA's purpose, however, the Eighth Circuit's interpretation of the TIA is deeply problematic, because the City's conventional tax "assessment, levy or collection" claim, 28 U.S.C. § 1341, was dismissed, and the only issues addressed by the federal courts concerned the validity and meaning of the Ordinance under state and local law.

solely on the identity of the plaintiff thus conflicts with "the direct, broad, and unqualified language of the statute." *Hibbs*, 542 U.S. at 126 (Kennedy, J., dissenting).

Importantly, there is no affirmative evidence that the authors of the TIA believed that the statute was inapplicable whenever a state or local tax authority attempts to secure a federal declaration regarding the validity and scope of its tax authority.[9] Just as there is "little practical difference between injunctive and declaratory relief" for purposes of applying the TIA, *Grace Brethren*, 457 U.S. at 408, there is *no* practical difference between declaratory relief sought by a taxpayer and declaratory relief sought by the tax

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[9] To be sure, the vast majority of cases that have given rise to a TIA defense have been brought by taxpayers. *See, e.g.*, *Hibbs*, 542 U.S. at 107 ("[T]his Court has interpreted and applied the TIA only in cases . . . in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes."). *But see id.* at 127 (Kennedy, J., dissenting) (stating that "our failure to consider a question hardly equates to a thing's being decided"). Putting aside that nothing in the text of the TIA suggests that its application turns on the identity of the plaintiff, the Eighth Circuit's decision threatens to shift this paradigm by not only affirmatively inviting state and local tax authorities to press tax claims in federal court whenever it is in their strategic interest to do so, but by opening the door to the removal of state court tax claims to federal court by defendants whenever a case satisfies the requirements of 28 U.S.C. § 1332. *Compare, e.g.*, *Orange County*, 440 F. Supp. 2d at 1343 (TIA barred assertion of federal jurisdiction over County's declaratory judgment action originally brought in state court and removed by taxpayer to federal court).

authority. Regardless of how the parties are aligned, the federal court is declaring the validity *vel non* of a state or local tax, and the case threatens federal interference with the administration or enforcement of the tax. *Compare City of Jefferson City*, 531 F.3d at 599 (noting that the City "sought a declaratory judgment that the tax ordinance applies to the defendants") *with, e.g.*, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943) (dismissing case where the taxpayer sought "a declaratory judgment that the state law as applied to petitioners and their employees is unconstitutional and void").

Irrespective of who initiates the suit, the court must decide the validity of the tax and that decision, if it is contrary to the claim brought by the tax authority, will effectively "enjoin, suspend or restrain the assessment, levy or collection of [a] tax under State law," 28 U.S.C. § 1341, and result in a reduction in tax revenues, *Hibbs*, 542 U.S. at 106. *See, e.g., Keleher*, 947 F.2d at 549-50 ("Thus, the fact that the City, rather than NET, was the party that invited the intervention of the federal courts does not serve to eliminate the Act's jurisdictional bar."), *criticized in Acker*, 527 U.S. at 434;[10] *see also Hardwick v. Cuomo*, 891 F.2d 1097, 1104 (3d Cir. 1989) ("[t]he purposes served by the Tax Injunction Act are no less thwarted by actions brought by persons other than taxpayers to challenge the imposition of state taxes than by taxpayers' actions"); *City of Burbank*, 658 F.2d at 709 (holding that the TIA barred declaratory judgment claim brought by California municipalities

[10] *See* discussion *supra* note 6.

against a sister State).[11] Even the *Vonage* court, which held that the TIA barred the taxpayer's counterclaim but not the tax authority's declaratory judgment claim, recognized that it could not adjudicate the case without addressing the taxpayer's defenses. 544 F. Supp. 2d at 466.

Further evidence that the prohibition in the TIA focuses on the subject matter of the suit rather than the identity of the plaintiff can be found in the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a). *See Hibbs*, 542 U.S. at 102-03; *Acker*, 527 U.S. at 434-35. Although the TIA was loosely modeled after the AIA, there are significant textual differences between the two statutes. *See, e.g.*, *Hibbs*, 542 U.S. at 121 (Kennedy, J., dissenting). The AIA "shields *federal* tax collections from federal-court injunctions," *id.* at 104 (majority opinion) (emphasis added), and provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court *by any person, whether or not such person is the person against whom such tax was assessed.*" 26 U.S.C. § 7421(a) (emphasis added). Thus, the AIA expressly bars suits to restrain the assessment or collection of taxes by "person[s]," a term that is defined to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," 1 U.S.C. § 1, but does not include the United States. *See Acker*, 527 U.S. at 434-35 (stating

[11] The Eighth Circuit's ruling that the TIA does not apply to the City's declaratory judgment claim places the Eighth Circuit in conflict with the Ninth Circuit's ruling in *Burbank* that the TIA does apply to a tax authority's declaratory judgment claim.

that the AIA "of course, does not bar federal-court adjudication of suits initiated by the United States to collect federal taxes; it precludes only suits brought by taxpayers to restrain the United States from assessing or collecting such taxes").

In sharp contrast to the AIA, the prohibition in the TIA broadly commands that district courts "shall not enjoin, suspend or restrain" state taxes, and does not qualify this prohibition in any way with respect to the identity of the party bringing suit. 28 U.S.C. § 1341. Instead, the only qualification in the TIA itself relates to circumstances "where a plain, speedy, and efficient remedy may [not] be had in the [State] courts." *Id.*; *see also Farm Credit Servs.*, 520 U.S. at 823-24 (recognizing exceptions to the TIA only "where the state remedy is wanting" or where the "United States sues to protect itself or its instrumentalities from state taxation").

The *Acker* Court failed to acknowledge this critical distinction and completely ignored that, unlike the AIA, the prohibition in the TIA is not party-specific.[12] The absence of any language in the TIA that mirrors the party-specific language in the AIA is logical, however, because the AIA is focused on federal judicial interference with *federal* tax laws, while the prohibition in the TIA is concerned with intergovernmental interference, *viz.*, federal inteference with tax functions

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[12] The loose resemblance between the AIA and the TIA was the basis for the Court's conclusion in *Acker* that, like the AIA, the TIA does not bar *collection* actions brought by a tax authority. *See Acker*, 527 U.S. at 435.

traditionally reserved to *state* administrators and courts. In this respect—though the Court's prior TIA decisions have ignored the asymmetry between the TIA and the AIA—the TIA's categorical bar parallels other statutory prohibitions on federal interference with state courts and agencies. *See, e.g.*, 28 U.S.C. § 2283 (stating that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments").

Moreover, *Acker* fails to acknowledge that another precursor of the TIA was the Johnson Act, the purpose of which is "to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings." *Grace Brethren*, 457 U.S. at 410 n.22; *see also id.* ("Both the Senate and House Reports, as well as the congressional debates of the Act, expressly rely on the congressional purpose underlying the Johnson Act of 1934 . . . ."). In language similar to that used in the TIA, the Johnson Act dictates that "[t]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision" where four conditions are met, including that "[a] plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1342. In contrast to the party-specific language in the AIA, the plain language of the Johnson Act demonstrates that, in enacting the TIA, Congress was not concerned with protecting state tax revenues, but

with imposing a categorical bar on federal interference in conventional state tax administration and enforcement proceedings. *See Grace Brethren*, 457 U.S. at 409 n.22.

Applying traditional canons of statutory interpretation, there is no basis to read a party-specific limitation into the TIA because there is no textual support for such a limitation. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*"). Thus, at least as applied to tax "assessment, levy or collection" actions that raise issues of state and local law, 28 U.S.C. § 1341, the analysis of the AIA in *Acker* is flawed because it fails to recognize that the jurisdictional bar in the TIA, in contrast to the AIA, is not dependent on the identity of the plaintiff.

B. The Eighth Circuit's Broad Construction Of The Court's Holding In *Acker* Invites Absurd Results.

The Eighth Circuit's refusal to apply the TIA to the City's declaratory judgment claim invites absurd results. As a threshold matter, the Eighth Circuit's analysis opens a breach in the TIA that effectively guts what this Court has consistently identified as a central purpose of the statute: "The [TIA] was . . . shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings." *Acker*, 527 U.S. at 435; *see also Hibbs*, 542 U.S. at 104-05 ("Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the tax authority."). By endorsing both

(1) federal declarations of the validity and meaning of tax provisions under state and local law; and (2) at least in concept, the removal of such actions to federal court whenever the requirements of diversity jurisdiction are met, the Eighth Circuit has invited taxpayers to make an end-run around the prohibition in the TIA by refusing to pay, waiting for the tax authority to sue, and then removing the case to federal court. Though, as this Court noted in *Acker*, discretionary abstention doctrines may afford an alternate means of avoiding the assertion of federal jurisdiction in such circumstances, 527 U.S. at 435 n.5, it would be bizarre to conclude that, as applied to conventional tax suits brought under state and local law, the emphatic prohibition set forth in the TIA adds absolutely nothing of substance to the discretion that federal courts have long exercised in the absence of a statutory command.

Moreover, if *Acker* is construed to hold, in effect, that the TIA is inapplicable whenever a declaratory judgment action is brought by a tax authority, the existence of federal jurisdiction turns on whether a state or local tax authority decides to "waive" the protections of the TIA. This theory is flawed, however, both for the reasons set forth above and because, as Justice Alito opined post-*Acker* when he was a judge on the Third Circuit, "a [tax authority] cannot waive the Tax Injunction Act's protection." *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 247 n.1 (3d Cir. 2003) (Alito, J.); *accord Hardwick*, 891 F.2d at 1104 ("[E]ven though the Tax Injunction Act is intended to protect the tax authorities acting under state law, it has been regularly held that they cannot waive its jurisdictional

bar as it is a restraint on the courts, not the parties."). Contrary to the Eighth Circuit's analysis, state and local tax authorities should not be permitted to circumvent the TIA's jurisdictional bar by purporting to "waive" their way into federal court to federalize conventional state and local tax assessment, collection and levy disputes in which there is no federal interest.

Furthermore, a waiver theory of the TIA ignores the procedural complications that easily can be introduced by state law, and further ignores whether the tax authority before the court should be deemed competent to waive the TIA's jurisdictional bar. In this case, the Eighth Circuit's refusal to apply the TIA's prohibition bifurcated the parties' tax dispute between the federal and state courts because, as the district court held, the City's collection claim was barred as a matter of state law by the City's failure to comply with its own mandatory assessment and collection procedures. In addition, the clear import of the Eighth Circuit's decision is that subordinate, local tax authorities can compel federal courts to construe the validity of state constitutional provisions and statutes that bear on tax assessment and collection without the consent (or, for that matter, the participation) of the state's attorney general. For example, the Eighth Circuit's decision would permit a *municipality* to seek a ruling that a *state* tax law is unlawful, *see, e.g., Village of Arlington Heights v. Reg'l Transp. Auth.*, 653 F.2d 1149 (7th Cir. 1981) (dismissing on Fourteenth Amendment grounds a municipal declaratory judgment action that challenged the constitutionality of a state tax statute and implementing regulations), or a ruling that a *sister state's* tax law is unlawful, *see, e.g., City of Burbank*,

658 F.2d at 709 (TIA barred municipal declaratory judgment claim against sister state). In either case, the state attorney general may have no say in whether the validity of the state's tax law should be considered by a federal court. Instead, the decision to invoke the jurisdiction of the federal courts is entirely dependent upon the whim of the subordinate, local tax authority that brings suit.

These are not hypothetical concerns because, in this very case, the Missouri Legislature enacted a law (HB 209) that replaced the City of Springfield's tax (and similar taxes in other cities) with a statewide tax scheme that purported to compel dismissal of the case at bar. Because the state law would have disposed of its federal action, the City of Springfield asked the federal district court in this case to hold that HB 209 violated the Missouri Constitution. Doc. 250. The City's request thus placed the federal courts squarely in the position of "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection," 28 U.S.C. § 1341, authorized by the state tax statute. Though the district court was persuaded to abstain and avoid consideration whether to enjoin, suspend or restrain HB 209 on the ground that there happened to be a parallel action pending in state court that presented the same issue, *see* App. 112a; *City of Springfield v. Sprint Spectrum L.P.*, 203 S.W.3d 177 (Mo. 2006), the Eighth Circuit's ruling counterintuitively suggests that the TIA would not have presented any impediment to the City's federal court challenge.

Last, if the Eighth Circuit's decision means that federal courts can render declaratory judgments on the

validity of state and local tax laws *only if the decisions are favorable to the tax authority, but cf. Acker*, 527 U.S. at 435 (holding that the TIA does not bar taxpayers in *collection suits* "from urging defenses . . . that the tax for which collection is sought is invalid"), the court's decision runs afoul of at least two principles that are essential to the orderly administration of justice.

First, recognition of a "tax authority" exception to the TIA is inconsistent with the common-sense rule that "[t]he existence of federal subject matter jurisdiction over a given case *does not, and indeed cannot, turn upon its eventual resolution on the merits.*" *In re Chateaugay Corp.*, 53 F.3d 478, 493 n.7 (2d Cir. 1995) (emphasis added); *accord Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998); *Verizon Maryland, Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002). By the Eighth Circuit's reasoning, the basis for federal subject matter jurisdiction would potentially evaporate the moment that the case is decided in favor of the taxpayer. *See, e.g., Keleher*, 947 F.2d at 549 (after bringing suit for a declaratory judgment, City moved to vacate the district court's ruling in favor of the taxpayer because the decision had the effect of enjoining the City's collection of tax revenues).

Second, any suggestion that the implied exception in the TIA is a one-way ratchet raises serious due process concerns, because it would permit a tax authority whose claim is defeated in federal court to obtain a second bite at the apple by filing another action alleging identical claims in state court. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (noting that the doctrine of res judicata "is a rule of fundamental and

substantial justice" (quotation omitted)); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 n.18 (1971) (noting "that one of the underpinnings of the general concept of res judicata is the prevention of harassment of some litigants by the repeated assertion of the same or different claims against them by others"); *Cont'l Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979) (stating that "it appears rather fundamental that the Government cannot, without violating due process, needlessly require a party to undergo the burdens of litigation").

Because the Eighth Circuit's ruling invites absurd results, the Court should grant certiorari to make clear that the TIA constrains the right of state and local tax authorities to pursue declaratory judgment claims in federal court concerning "the assessment, levy or collection of any tax under State law," 28 U.S.C. § 1341.

CONCLUSION

For the foregoing reasons, the Court should grant Alltel's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 3, 3008

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 07-2884

City of Jefferson City, Missouri,

Plaintiff,

City of Springfield, Missouri,

Plaintiff/Appellee,

v.

Cingular Wireless LLC; Southwestern Bell Wireless, LLC,

Defendants/Appellants,

SBC Communications, Inc., Southwestern Bell Telephone, LP; Nextel West Corp.; Alltel Communications, Inc.,

Defendants.

Appendix A

No. 07-2885

City of Jefferson City, Missouri,

Plaintiff,

City of Springfield, Missouri,

Plaintiff/Appellee,

v.

Cingular Wireless LLC; SBC Communications, Inc; Southwestern Bell Wireless, LLC; Southwestern Bell Telephone, LP; Nextel West Corp.,

Defendants,

Alltel Communications, Inc.,

Defendant/Appellant.

Submitted: March 12, 2008
Filed: July 3, 2008

Before WOLLMAN, HANSEN, and MELLOY, Circuit Judges.

Appendix A

WOLLMAN, Circuit Judge.

The issue before us is whether providing cell phone services[1] in the City of Springfield ("Springfield")[2] makes a company subject to a local tax ordinance on businesses who engage in "supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city."[3] Springfield Code § 70-452 (2000). The district court[4] granted Springfield's request for declaratory judgment and held that the defendants, Alltel Communications, Inc. ("Alltel"), Cingular Wireless LLC, and Southwestern Bell Wireless, LLC (Cingular and Southwestern Bell hereinafter referred to as "Cingular"), provide telephonic services within Springfield and are therefore subject to the tax. The district court dismissed Springfield's tax collection claim under Missouri's exclusive tax remedy doctrine because

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1. The defendants in this case describe their services as wireless, telecommunications, or "Commercial Mobile Radio Services." We will refer to the services generally as "cell phone services," as that is how the services are marketed to the public and generally recognized.

2. The City of Jefferson's claims were dismissed by stipulation.

3. It is undisputed that the defendants engage in providing services within Springfield. Whether these services are telephones and telephonic services is the issue in this case. The quantity of services provided "within the city," and the resulting amount of taxes owed is an issue of fact not before us today.

4. The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

Springfield must follow its own tax assessment and collection procedures before bringing suit to collect the tax. Because we conclude that Springfield's request for a declaratory judgment on the issue of liability was properly before the district court and that a cell phone is a telephone and cell phone services are telephonic services for purposes of Springfield's tax ordinance, we affirm.

I. Background

Springfield has a long-standing ordinance that imposes a 6% tax on the gross receipts of any business that supplies telephone and telephonic service within Springfield. This ordinance was modified in 2000 as part of a recodification that changed section numbers, clarified existing language, and made the code electronically searchable. The 2000 recodification of the tax ordinance added "telecommunications" and "telecommunications services" to the existing language in the ordinance. Springfield Code § 70-452.

In 2004, Springfield sent a demand letter to cell phone companies that did business within Springfield requesting payment of the tax for the past five years and indicating that if no action was taken, Springfield would pursue legal remedies.[5] The defendants did not comply, and Springfield brought this suit in federal district court to collect the past-due taxes.

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5. The letter stated that the five-year time frame was chosen because of the relevant statute of limitations.

Appendix A

Springfield's complaint sought collection of the tax owed. Springfield filed a motion for summary judgment on the issue of whether the defendants were liable to pay the tax, which the district court and the parties treated as a request for a declaratory judgment on the issue of liability. The defendants argued that they provide "Commercial Mobile Radio Service" ("CMRS"), and therefore the tax does not apply to them. The defendants also challenged the validity of the ordinance. On June 9, 2005, the district court held that the term "telephone" in the tax ordinance encompasses CMRS and that the defendants offer these services within Springfield and are therefore subject to the tax. *City of Jefferson v. Cingular Wireless, LLC*, No. 04-4099, 2005 WL 1384062 (W.D. Mo. June 9, 2005) (*City of Jefferson I*) (order granting plaintiffs' motion for partial summary judgment). The district court did not reach the issue of whether the 2000 modification of the ordinance violated the Hancock Amendment to the Missouri Constitution because it concluded that the issue in the case involved the language in the ordinance that existed before 2000. The district court did not rule on the amount of tax owed.

On August 21, 2006, Alltel filed a motion to dismiss for lack of subject matter jurisdiction or, in the alternative, that the district court abstain from deciding the case. On October 17, 2006, the district court denied the motion to dismiss on the legal issue of liability, but dismissed Springfield's claim for tax collection without prejudice, concluding that because Springfield had an exclusive administrative remedy for tax assessment and collection, it was required to follow that procedure. *City of Jefferson*

v. Cingular Wireless, LLC, No. 04-4099, 2006 WL 2987678 (W.D.Mo. Oct.17, 2006) (*City of Jefferson II*) (order dismissing Springfield's tax collection claim without prejudice). On Alltel's motion for reconsideration, the district court declined to vacate its June 9, 2005, order and held that the defendants were liable to pay the tax. *City of Jefferson v. Cingular Wireless, LLC*, No. 04-4099, 2006 WL 3937243 (W.D.Mo. Dec.20, 2006) (*City of Jefferson III*) (order declining to vacate or amend *City of Jefferson I* and *City of Jefferson II*).

Alltel then argued that it had not been given a fair opportunity to litigate the propriety of the request for declaratory judgment. The district court vacated *City of Jefferson I* and *City of Jefferson II* and allowed Springfield to amend its complaint to add a claim for declaratory judgment on the issue of liability.[6] Count I of the second amended complaint requested past-due taxes from the defendants. Count III sought a declaratory judgment that the tax ordinance applies to

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6. During a teleconference on January 29, 2007, the district court discussed with the parties the prospect of allowing Springfield the opportunity to amend its complaint to add a claim for declaratory judgment. The district court noted that it was allowing the amendment for Alltel's benefit because Alltel argued that it was unfair that it did not have a chance to raise its abstention argument in a timely fashion. In the July 3, 2007, order, the district court further noted that it believed Springfield's claim for declaratory judgment, while not originally pleaded, was properly before the court, even before the second amended complaint, pursuant to Rule 15 of the Federal Rules of Civil Procedure. *City of Jefferson IV*, 2007 WL 1965572, at *2 n. 4.

the defendants. Alltel filed a motion to dismiss the second amended complaint. On July 3, 2007, the district court dismissed Count I without prejudice as to all defendants and denied the motion to dismiss Count III. *City of Jefferson v. Cingular Wireless, LLC*, No. 04-4099, 2007 WL 1965572 (W.D.Mo. July 3, 2007) (*City of Jefferson IV*) (order *nunc pro tunc* dismissing without prejudice Springfield's tax collection claim).

Also on July 3, 2007, the district court entered another order, which held that the tax is enforceable against the defendants because it applies to cell phone services provided within Springfield. *City of Jefferson v. Cingular Wireless, LLC*, No. 04-04099, 2007 WL 1965572 (W.D.Mo. July 3, 2007) (*City of Jefferson V*) (order *nunc pro tunc* granting Springfield's motion for summary judgment). Accordingly, the district court granted Springfield's motion for summary judgment on the issue of liability. The district court noted that the amount of tax owed is a fact-intensive inquiry that must be resolved through Springfield's administrative process, and it thus dismissed Springfield's request for monetary damages.

II. Jurisdiction, Exhaustion, and Abstention

Alltel asserts that the district court lacked subject matter jurisdiction under Missouri's exclusive tax remedy doctrine and exhaustion doctrine, that the constitutional justiciability requirements of ripeness and standing were not met, that Springfield failed to state a claim, and that even if the district court had jurisdiction, it should have abstained.

Appendix A

Our resolution of this case requires us to interpret Missouri law.

> We review the district court's interpretation of state law de novo. We are bound by the decisions of the Supreme Court of Missouri in interpreting Missouri law. Because the Supreme Court of Missouri has not yet addressed this precise issue, we must determine what that court would probably hold if it were called upon to decide the issue. In making this determination a federal court may consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue.

Missouri v. City of Glasgow, 152 F.3d 802, 805-06 (8th Cir.1998) (internal citations and quotation omitted). We review *de novo* questions of federal subject matter jurisdiction and the district court's disposition of a motion to dismiss. *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1012 (8th Cir.2002) (discussing subject matter jurisdiction); *Breedlove v. Earthgrains Baking Cos., Inc.*, 140 F.3d 797, 798-99 (8th Cir.1998) (on a motion to dismiss, "[a] district court must accept the allegations contained in the complaint as true, and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party" (internal citation omitted)). We review the district court's decision regarding whether to abstain for abuse of discretion. *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir.2004) ("the underlying legal determinations receive plenary review").

Appendix A

A. Subject Matter Jurisdiction

It is undisputed that the parties are diverse and that more than $75,000 is in controversy. Furthermore, we note that Cingular believes that the district court properly exercised its jurisdiction in this case. Alltel's argument that the district court did not have subject matter jurisdiction rests on the assertion that a Missouri state court would not have jurisdiction to hear this case under the Missouri exclusive tax remedy doctrine and the doctrine of administrative exhaustion, with the result that, pursuant to *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal subject matter jurisdiction is lacking. Even if we assume, without deciding, that the exclusive tax remedy doctrine is jurisdictional,[7] we conclude that neither doctrine would prevent a Missouri state court from exercising its jurisdiction in this case and therefore subject matter jurisdiction is not lacking.

1. Missouri's Exclusive Tax Remedy Doctrine

The Missouri exclusive tax remedy doctrine requires a taxing authority to follow its tax assessment and collection procedures before a tax collection claim can be brought in court. *City of St. Louis v. United Rys. Co. of St. Louis*, 263 Mo. 387, 174 S.W. 78, 93 (1914) (en banc) ("if a remedy is specified for the collection of a

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7. The district court dismissed Springfield's tax collection claim for failure to state a claim, not for lack of subject matter jurisdiction. *City of Jefferson II*, No. 04-4099, 2006 WL 2987678 (W.D.Mo. Oct. 17, 2006).

tax, it will be held to be exclusive, where no other is provided"); *Missouri ex rel. Hayes v. Snyder*, 139 Mo. 549, 41 S.W. 216, 217 (1897). The Missouri exclusive tax remedy doctrine does not apply, however, to the question in this case because the district court was presented with the legal question of whether the tax applies to the defendants, not the factual question of how much Springfield can collect from the defendants, assuming that they are subject to the tax. *See* M.L. Cross, Annotation, *Tax Questions as Proper Subject of Action for Declaratory Judgment*, 11 A.L.R.2d 359 (Supp.2005) (outlining cases from other jurisdictions, including New York, which have similar exclusive tax remedy doctrines but allow declaratory judgments for the pure legal issue of the validity or application of a tax). Although Springfield has an administrative remedy for tax assessment and collection, the ordinance does not provide a specific or exclusive remedy for a challenge to the validity or application of the ordinance.[8] The cases cited by Alltel address only tax collection claims in which the state or local governmental entity is seeking a money judgment. *See Missouri ex rel. Hayes*, 41 S.W. at 217 ("if the statutes of this state make special provisions for the collection of taxes against real estate, and do not apparently contemplate that any others will be necessary, the mode of collection prescribed by statute is exclusive"); *Missouri ex rel. George v. Dix*, 159 Mo.App. 573, 141 S.W. 445, 446 (1911) ("The point at

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8. *See City of Jefferson IV*, 2007 WL 1965572, *3-*4 (discussing the tax assessment and collection procedures and concluding that such administrative procedures are sufficient for Springfield's *tax collection* claim).

issue is whether the remedy provided in the ordinance is exclusive or merely cumulative. If exclusive, an action for a money judgment for the delinquent tax will not lie, but if cumulative the present suit was properly brought, and, as the facts are undisputed, the judgment should have been for the city."); *see also Missouri ex rel. Steed v. Nolte*, 345 Mo. 1103, 138 S.W.2d 1016 (1940) (en banc) (identifying the procedure for fourth-class cities to collect delinquent taxes); *Kansas City v. Field*, 285 Mo. 253, 226 S.W. 27 (1920) (outlining cases); *City of Carondelet, to Use of Reuter v. Picot*, 38 Mo. 125, 1866 WL 4243, at *3 (1866) (cannot bring action to compel the payment of taxes unless the tax statute authorizes the action). Alltel has not pointed to any cases in which the exclusive tax remedy doctrine was used to dismiss a claim involving the legal issue of whether a tax was valid or whether it applied to a particular taxpayer.

Alltel's assertion that a Missouri court would have to dismiss Springfield's claim for declaratory judgment is unfounded because the doctrine does not apply to Springfield's claim. Because there is no established precedent indicating that Springfield's claim for declaratory judgment may not be heard until after the administrative procedures for tax assessment and collection have been completed, we conclude that the doctrine would not require a Missouri court to dismiss Springfield's claim for declaratory judgment. This conclusion is supported by several cases in which Missouri courts have considered the legal issue of the validity or the applicability of a tax ordinance without requiring the exhaustion of administrative assessment

and collection procedures. *See Council House Redev. Corp. v. Hill*, 920 S.W.2d 890 (Mo.1996) (en banc) (trial court erroneously dismissed taxpayer's claim for declaratory judgment; administrative exhaustion not required when the issue was only whether the taxpayer was exempt from taxation, not the valuation of the tax assessment); *Nicolai v. City of St. Louis*, 762 S.W.2d 423 (Mo.1988) (en banc) (taxpayer sought declaratory judgment that St. Louis did not have authority to tax his premises as a cat kennel; circuit court dismissed for failure to state a claim and failure to exhaust administrative remedies, but the Missouri Supreme Court reversed and issued declaratory judgment even though neither St. Louis nor the taxpayer had pursued administrative collection or appellate procedures); *B & D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759 (Mo.1983) (en banc) ("It is a firmly established principle that when an administrative remedy is adequate, ordinarily that remedy is exclusive. . . . However, the availability of an administrative remedy does not bar other remedies under all circumstances. For instance, when a taxpayer does not question the valuation of his property, but asserts it is not subject to the tax, he need not appear before the Board of Equalization but may enjoin the enforcement of the tax."); *Washington Univ. v. Baumann*, 341 Mo. 708, 108 S.W.2d 403 (1937) (en banc) (allowing taxpayer an injunction against the sale of property for the collection of taxes even though administrative remedies were not exhausted because the taxpayer was contractually immune from taxation, one judicial proceeding on the issue of exemption could avoid a multitude of litigations, and the taxpayer would

suffer irreparable injury without the injunction); *United Rys. Co. of St. Louis*, 263 Mo. 387, 174 S.W. 78 (giving res judicata effect to prior federal court case that held the railroad was subject to a city tax); *Holland Furnace Co. v. City of Chaffee*, 279 S.W.2d 63 (Mo.Ct.App.1955) (considering claim for declaratory judgment regarding the validity of a tax ordinance).

Alltel asserts that any case in which a taxpayer requested a declaratory judgment that it was not subject to a tax ordinance is inapposite because, in the case before us, Springfield is the entity seeking a declaratory judgment and is thereby attempting to avoid its own administrative procedures. We disagree. If, under the exclusive tax remedy doctrine, Missouri courts will address the pure legal issue of whether a tax applies in a particular situation before the parties complete the administrative tax assessment and collection procedures, it should not matter which party is seeking the declaratory judgment. Furthermore, we note that completing the administrative procedures in this case would be time-consuming, expensive, and ultimately unnecessary if the ordinance is held to not apply to the defendants. Additionally, the pure legal issue involved in this case is more suited for judicial determination than for administrative determination. *See State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo.1982) (en banc) ("Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise. The declaratory judgment is a judicial remedy. . . . The

declaration of the validity or invalidity of statutes and administrative rules thus is purely a judicial function." (internal citations omitted)); *see also* Springfield, Mo., Code §§ 70-131 through 70-157 (administrative hearings do not have formality requirements such as the rules of evidence). Accordingly, we conclude that the district court properly decided that the Missouri exclusive tax remedy doctrine did not require it to dismiss Springfield's claim for declaratory judgment on the issue of liability.

2. Administrative Exhaustion Doctrine

Alltel's remaining arguments regarding subject matter jurisdiction, justiciability,[9] failure to state a claim, and abstention all rest on the contention that Springfield failed to exhaust its administrative remedies. *See Premium Standard Farms, Inc. v. Lincoln Twp. of Putnam County*, 946 S.W.2d 234, 237 (Mo.1997) (en banc) (exhaustion of administrative remedies generally required before a court has jurisdiction unless the

9. We note that, although justiciability requirements cannot be waived by the parties, Alltel's Answer to Springfield's Complaint and First Amended Complaint conceded that it believed a justiciable controversy existed. Even without this concession, we conclude that Springfield's claim for declaratory judgment raises a case or controversy and meets the constitutional justiciability requirements. *See Arsenal Credit Union v. Giles*, 715 S.W.2d 918, 921 (Mo.1986) (en banc) (concluding that a case or controversy existed regarding a claim for declaratory judgment on the constitutionality of a tax exemption and therefore the claim was properly before the court).

administrative remedy is not adequate or the controlling issue in the case is a pure legal issue). As the district court found, and as discussed above, Springfield's tax assessment and collection procedures do not provide an adequate remedy for determining whether the tax applies to the defendants. Although Alltel vigorously asserts that the administrative remedy for tax assessment and collection should be used to determine liability, the district court noted in *City of Jefferson III* that Alltel has refused to pay the tax and refused to file the information needed for Springfield to make a tax assessment.[10] *See* 2006 WL 3937243, at *2. Although Alltel's refusal to cooperate may not make the tax collection remedy impossible, it does highlight the inadequacy of those procedures, which would require a lengthy and expensive calculation of the tax owed before a legal determination is made whether the defendants are liable for the tax. Thus, we conclude that Springfield's administrative procedures for tax assessment and collection are not adequate to determine the issue of liability and do not represent an exclusive remedy on that issue.

Furthermore, in the absence of any tax collection claim, no factual disputes remained, nor was the district court required to make any classifications or value

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10. Springfield's Second Amended Complaint, filed on February 7, 2007, states that Alltel has made a recent payment of taxes without waiving its position in this litigation but further notes that the defendants have refused to pay their full tax liability despite opportunities to do so under protest.

determinations.[11] Instead, Springfield's request for a declaratory judgment presented the court with an issue of statutory interpretation. Such questions present pure legal issues and therefore satisfy an exception to the general exhaustion of remedies rule. *Premium Std. Farms*, 946 S.W.2d at 237-38 (permitting court to resolve a purely legal issue of whether a township had authority to impose certain regulations, even though the plaintiff had not sought a variance and therefore had not exhausted administrative remedies); *City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 112 (Mo.Ct.App.2000) (question of whether zoning ordinance applied was question of law and therefore administrative remedies did not need to be exhausted before the court could determine immunity). Accordingly, we conclude that Springfield's claim for declaratory judgment satisfies at least one of the exceptions to the exhaustion doctrine. Thus, the district court had subject matter jurisdiction, the justiciability requirements are met, and the district court did not err in denying Alltel's motion to dismiss for failure to state a claim.

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11. Alltel repeatedly argues that the issue before the district court was not a pure legal issue and that it was at least a mixed question of fact and law. This argument ignores the fact that the district court dismissed Springfield's tax collection claim. Without the collection claim, there are no facts to determine. The sole issue before the court is whether the defendants' business activity falls within the statutory language of providing telephones and telephonic services.

3. Tax Injunction Act

Alltel raises the application of the Tax Injunction Act, 28 U.S.C. § 1341, which presents a question of subject matter jurisdiction. *See Burris v. City of Little Rock*, 941 F.2d 717, 721 (8th Cir.1991) (raising issue of Tax Injunction Act sua sponte). Section 1341 states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." In addition to prohibiting injunctive relief, § 1341 also bars declaratory judgment actions. *Burris*, 941 F.2d at 720 (citing *California v. Grace Brethren Church*, 457 U.S. 393, 411, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982)). The objective of § 1341 is:

> (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances.

Hibbs v. Winn, 542 U.S. 88, 104, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (citing the Senate Report). When Congress enacted § 1341, "Congress trained its attention on taxpayers who sought to avoid paying their tax bill

by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration." *Id.* at 104-05, 105 n. 7, 124 S.Ct. 2276 (internal quotation omitted) ("The TIA does not prohibit interference with 'the operation of, or compliance with,' state tax laws; rather, § 1341 proscribes interference only with those aspects of state tax regimes that are needed to produce revenue—i.e., assessment, levy, and collection."). Accordingly, there is a crucial distinction between a plaintiff who seeks a declaratory judgment that a specific tax is unconstitutional or invalid and a plaintiff who seeks a declaratory judgment that a particular taxpayer is engaged in an activity that makes the taxpayer subject to a state or local tax. *See id.* at 104, 124 S.Ct. 2276 (allowing party to challenge in federal court the constitutionality of a state tax credit given to a third-party); *Jefferson County v. Acker*, 527 U.S. 423, 433-35, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999) (allowing federal jurisdiction over a claim brought in state court to collect state taxes and removed by defendants to federal court wherein the defendants argued that application of the tax violated federal law; the Court noted that in enacting § 1341, "the state laws to which Congress referred surely do not preclude the States from enforcing their taxes in court").

Alltel's citation to *Orange County v. Expedia, Inc.*, is neither controlling nor persuasive. *See* 440 F.Supp.2d 1341 (M.D.Fla.2006). In *Expedia*, a district court

dismissed a claim by a county seeking a declaratory judgment that it had the "power, privilege and right to audit the Defendants regarding the [tax], and to assess and collect [the tax] due from the Defendants." *Id.* at 1343. The court acknowledged that the Supreme Court has sanctioned federal jurisdiction over claims by local governments seeking tax collection. *Id.* at 1343 (citing *Acker*, 527 U.S. at 433-34, 119 S.Ct. 2069). Nevertheless, without analyzing the text of § 1341, its purpose, or its legislative history, the court held that declaratory judgments sought by local governments are always barred by § 1341. *Expedia*, 440 F.Supp.2d at 1344. We conclude that neither the text of § 1341 nor the relevant Supreme Court holdings compel such a result. Springfield's claim in this case is distinguishable from that asserted in *Expedia* because Springfield is not seeking a determination of its "right" or "power" to tax telephones and telephonic services. Rather, the issue is one of statutory interpretation affecting the application of the tax, with the specific question being whether the defendants provide telephones and telephonic services and not whether the tax is valid.

We find more persuasive the reasoning in *Mayor & City Council of Balt. v. Vonage Am. Inc.*, in which a district court was faced with a situation similar to the one before us today. *See* 544 F.Supp.2d 458 (D.Md.2008). In *Vonage*, the City of Baltimore brought suit against a provider of "Voice over Internet Protocol," seeking a declaratory judgment that a local tax on telecommunications applied to the provider. *Id.* at 461. The provider filed a counterclaim seeking a declaratory

judgment that it was not subject to the tax. *Id.* The district court analyzed § 1341 and concluded that the provider's declaratory judgment was barred, but adopted the argument that Baltimore's claim for declaratory judgment was not barred by § 1341 because it was not a claim by a taxpayer seeking to prevent tax collection proceedings. *Id.* at 465-66 (citing *Acker*, 527 U.S. 423, 119 S.Ct. 2069, 144 L.Ed.2d 408). For the same reason, we conclude that § 1341 does not bar Springfield's claim in this case.

B. Abstention

With regard to its abstention claim, Alltel cites *Brillhart v. Excess Ins. Co. of Am.*, for the proposition that even if a district court has jurisdiction to enter a declaratory judgment, it is not required to exercise that jurisdiction. *See* 316 U.S. 491, 494, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942). *Brillhart* does not suggest, however, that the district court in this case was required to abstain. *See id.* at 494-95, 62 S.Ct. 1173 (motion to dismiss based upon a pending state proceeding). With regard to Alltel's citation to a state court case filed in the Circuit Court in St. Louis County on August 28, 2006, No. 01 CC-4454, Alltel has not indicated where in the record it made the district court aware of this case. Accordingly, we accept the district court's finding that there are no parallel state court cases and rest on the district court's conclusion, after conducting a thorough analysis of the six factors that should be considered, that it need not abstain. *See City of Jefferson IV*, 2007 WL 1965572, at *10 (discussing *Scottsdale Ins. Co. v. Detco Indus., Inc.*, 426 F.3d 994, 998-99 (8th Cir.2005)).

Alltel also argues that the district court should have abstained under *Burford v. Sun Oil Co.* because timely and adequate state review was available and the case involves difficult questions of state law and public policy. *See* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). Again, Alltel's argument comes down to the assertion that Springfield did not exhaust its administrative remedies. As discussed above, we agree with the district court that because there is no adequate administrative remedy for the legal issue presented in this case, exhaustion is not required. Additionally, the district court noted that early in the litigation it had inquired of the parties why the case was in federal court and heard no argument that it should abstain from hearing the case. *City of Jefferson IV*, 2007 WL 1965572, at *8; *see Evanston Ins. Co. v. Johns*, 530 F.3d 710, 713-14, 2008 WL 2493003, at *2 (8th Cir.2008). In fact, Alltel did not raise the issue of abstention until much time and effort had been invested by all parties and the district court had ruled against it. *City of Jefferson III*, 2006 WL 3937243, at *3. Accordingly, we conclude that the case was properly before the district court and the district court did not abuse its discretion by declining to abstain.

III. Springfield's Tax Ordinance

Alltel and Cingular argue that the district court erred in granting Springfield's motion for summary judgment because cell phone services are not telephonic services. Alltel contends that the district court erred by not strictly construing Springfield's authority to tax "telephone companies" and by not strictly construing

the terms "telephones" and "telephonic services" in the tax ordinance itself. Cingular asserts that it provides telecommunications services, not telephonic services, and that the district court erred by ignoring the 2000 modification of the tax ordinance and applying the language of the pre-2000 version. Defendants further argue that they are not subject to the tax on "telecommunications services" because Springfield's Charter grants it the authority to tax "telephone companies," not "telecommunications companies," and the 2000 recodification of the tax ordinance violated the Hancock Amendment. In the alternative, the defendants argue that the tax ordinance is ambiguous and therefore must be construed in favor of the defendants.

We review *de novo* a district court's grant of summary judgment. *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 519 F.3d 466, 471 (8th Cir.2008). In so doing, we view the record in the light most favorable to the nonmoving party and affirm if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We review *de novo* the district court's determinations of law. *Id.*

A. The Plain Language of Springfield's Tax Ordinance

Section 70-452 of the Springfield Code states that "[e]very person engaged in the business of supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city shall pay as a license tax a sum equal to six (6) percent

of the gross receipts from such business." The ordinance does not define the terms "telephones," "telecommunications," "telephonic services," or "telecommunications services." To ascertain the meaning of a city ordinance, we utilize the same rules of construction applied to statutes. *Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo.2007) (en banc). "The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Missouri ex rel. Young v. Wood*, No. SC 88840, 2008 WL 2346199, at *1 (Mo.2008) (en banc). The standard for determining whether a statute's terms are plain and clear is whether the terms are plain and clear to a person of ordinary intelligence. *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo.1988) (en banc). "When the statute's language is unambiguous, a court must give effect to the legislature's chosen language." *Missouri ex rel. Young*, 2008 WL 2346199, at *1. In the absence of statutory definitions, we turn to the ordinary meaning of the statutory terms as derived from a dictionary and consider the context of the statute in which the language appears. *Missouri ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo.2007) (en banc). In so doing, we presume that the legislature did not intend the statute to create an absurd result. *Weeks v. Missouri*, 140 S.W.3d 39, 47 (Mo.2004) (en banc).

The Springfield Code does not explicitly define the term "telephone." The use of the term throughout the Code, however, provides some insight into its intended meaning. *See Crum v. Vincent*, 493 F.3d 988, 996 (8th Cir.2007) (Missouri law requires courts to read statutes

in pari materia by harmonizing sections covering the same subject matter). Several sections list the information that must be provided to apply for a franchise or license. *See, e.g.*, Springfield, Mo., Code §§ 70-323(a), 70-594(b), 100-5.1. Among the information required is the applicant's "telephone number." Certainly the request for a telephone number in this context is not limited to the individual's land-line telephone, for a cell phone number would satisfy the purpose of these sections and it is unlikely an application would be denied on the basis that the applicant had a cell phone but not a land-line telephone. Additionally, section 78-62 describes the criminal offense of "Harassment by telephone." Surely this section is not limited to callers who harass others via a land-line telephone. *See also* Springfield, Mo., Code § 120-152(f)(1) (to report a potential problem regarding a discharge, "it is the responsibility of the industrial user to immediately telephone and notify the POTW of the incident").

It is also true that some provisions in the Springfield Code refer to telephones and their accompanying wires or cables. For instance, section 98-46(b) specifies the proper placement of "underground telephone cables, junction boxes and appurtenances thereto." *See also* Springfield, Mo., Code §§ 70-481, 70-482. It does not necessarily follow, however, that because some telephones have wires or cables, certain aspects of which are regulated by Springfield, those devices that do not have wires or cables are not telephones.

The word "telephonic" appears in only two Articles of the Code. Once in Article XI, which contains the tax ordinance at issue in this case, and secondly in Article V related to underground facility safety and damage prevention. Neither use suggests that the definition of the term is limited to land-line telephones.

Because the Springfield Code does not explicitly define the terms "telephone" or "telephonic services," we also look to the dictionary definition of these statutory terms to determine their ordinary meanings. *See Schumacher v. Cargill Meat Solutions Corp.*, 515 F.3d 867, 871 (8th Cir.2008) (looking to Merriam-Webster's Collegiate Dictionary for the ordinary meaning of a statutory term). The district court analyzed definitions from older dictionaries to determine the meaning of the word "telephone" during the time when the original tax ordinance was in effect. *See City of Jefferson V*, No. 04-04099, 2007 WL 1965572 (W.D.Mo. July 3, 2007). The district court looked to the 1969 and 1982 editions of the American Heritage Dictionary, which both define a "telephone" as "[a]n instrument that directly modulates carrier waves with voice or other acoustic source signals to be transmitted to remote locations and that directly reconverts received waves into audible signals; especially such an instrument connected to others by wire." The 1966 Webster's Third New International Dictionary defines "telephone" as "an instrument for reproducing sounds esp. articulate speech at a distance." The district court also looked at the 2000 edition of the American Heritage Dictionary, which defines "telephone" as "[a]n instrument that

converts voice and other sound signals into a form that can be transmitted to remote locations and that receives and reconverts waves into sound signals." Although the district court noted that these definitions provide examples of telephones that use wires, the examples are not exhaustive and do not preclude the conclusion that a device that meets the definition of telephone but which does not have wires is nonetheless a telephone. Accordingly, we also believe the following definition of "telephone" is especially helpful: "any of various devices (as a sound-signaling device or a speaking tube) resembling or suggesting the telephone." Webster's Third New International Dictionary 2350 (1981).

The 1999 edition of Merriam-Webster's Collegiate Dictionary defines "telephonic" as "of, relating to, or conveyed by a telephone." Webster's Collegiate Dictionary 1211 (10th ed.1999). The definition of "telephonic" in other dictionaries is substantially the same. Webster's Third New International Dictionary, for instance, defines "telephonic" as "conveying sound to a distance," or "of or relating to the telephone," or "carried or conveyed by telephone." Webster's Third New International Dictionary 2350 (1981).

Applying Missouri's rules of statutory construction, we conclude that the plain language of the tax ordinance makes it clear that the ordinance was intended to cover all telephonic services, regardless of the type of technology used to provide the services. Cell phones are commonly described as telephones and are used to accomplish the same function and purpose as a land-

line telephone.[12] Both devices convert voice and other sound signals into a form that can be transmitted to remote locations, both devices receive and reconvert waves into sound signals, and a cell phone resembles a telephone.

Admittedly, cell phones have newer and more advanced features than the telephones commonly used when the tax ordinance was first enacted. Nevertheless, nothing about the term "telephonic" in the tax ordinance is limited to the technology generally used to operate telephones in 1944. In fact, cases dating back to pre-1944 which discuss telephones and telephone systems describe them in terms of their purpose and not with regard to the type of technology used to operate them. *See Gilpin v. Savage*, 60 Misc. 605, 112 N.Y.S. 802, 805 (N.Y.Sup.1908), *rev'd on other grounds*, 201 N.Y. 167, 94 N.E. 656 (1911) ("The telephone is simply an instrument by which two persons may talk directly to each other."); *see also Missouri ex rel. Baltimore & Ohio Tele. Co. v. Bell Tele. Co.*, 23 F. 539, 541 (C.C.E.D.Mo.1885) ("A telephonic system is simply a system for the transmission of intelligence and news."). As the district court noted, there have been many advances in telephone technology over the past sixty years, and with each technological advancement we

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12. The Oxford English Dictionary defines a cell phone as a type of telephone. Oxford English Dictionary Additions Series OED Online (1993), *available at* http:// dictionary. oed. com (defining "cellphone" as "[a] hand-held or mobile radio-telephone providing access to a cellular radio network; a cellular telephone").

continue to refer to the product and services as telephonic. *See City of Jefferson V*, No. 04-04099, 2007 WL 1965572 (W.D.Mo. July 3, 2007). Springfield is not required to update its Code for the purpose of recognizing the advent of each new form of technology used to provide telephonic services. Accordingly, we conclude that the language of the tax ordinance is unambiguous and that the tax ordinance applies to cell phone services.

B. Extrinsic Evidence

Even if we believed the tax ordinance was ambiguous, however, we would conclude that extrinsic evidence supports the conclusion that Springfield intended the original language of the ordinance to cover services such as cell phone services, that the ordinary meaning of the term "telephone" includes cell phones, and that cell phone services are telephonic services.

The defendants describe their products as telephones and their services as telephonic services. *See City of St. Louis v. Miss. River Fuel Corp.*, 57 F.Supp. 549, 554 (E.D.Mo.1944) (terminology related to a particular industry should be given the meaning attributed to it by the industry). Cingular's website states that "[t]he world of wireless can be confusing. That's why we've provided this extensive glossary of terms to help you better understand the technologies behind wireless communications." The website's glossary defines "telephony" as "[o]riginally meaning voice (analog) communication by telephone (land line),

this term has come to encompass virtually all telecommunications, because virtually all telecommunications can be done over or while connected to a telephone line." "Cellular" is defined as "[a] wireless telephone network that connects radio frequencies from a mobile phone to a system of multiple cell sites, each consisting of an antenna and a base station, to a mobile telephone switching office, and ultimately to the public wireline telephone system." CMRS is defined as "[a]n FCC designation for any carrier or licensee whose wireless network is connected to the public switched telephone network and/or is operated for profit." Telecommunications is defined as "[c]ommunicating by telephone, telegraph or radio technology." These definitions do not indicate that telephonic services and telecommunications services are mutually exclusive. On the contrary, they support the conclusion that a cell phone, despite the fact that it is using a different technology than land-line telephones to accomplish the same purpose, is inherently telephonic in nature and should be subject to the same taxes as traditional land-line telephones regardless of what new terminology the defendants wish to use to describe their products and services in the course of this litigation. *See Rhodes v. City of Hartford*, 201 Conn. 89, 513 A.2d 124, 126 (1986) ("[o]ne should not be able to avoid a tax on shoes by calling shoes slippers" (alteration in original) (internal quotation omitted)).

Although there is no case law specifically addressing Springfield's tax ordinance, the Missouri courts have recently discussed issues related to the question before

us today. In *City of Sunset Hills v. Sw. Bell Mobile Sys., Inc.*, the Missouri Court of Appeals concluded that Southwestern Bell, a provider of cellular communication services, is a telephone company for purposes of the Sunset Hills' Charter authorizing it to tax telephone companies. 14 S.W.3d 54, 58-59 (Mo.Ct.App.1999) (Southwestern Bell described its cell phone business as "telecommunications antennae business"). Thereafter, in *City of Springfield v. Sprint Spectrum, L.P.*, the Missouri Supreme Court characterized the holding in *City of Sunset Hills* as stating that it is "absurd to deny that companies providing 'wireless communications services' were a part of the class of 'telephone companies' subject to a telephone business license fee." 203 S.W.3d 177, 187 n. 13 (Mo.2006) (en banc). Additionally, in other cases, Missouri courts have discussed cell phone companies and the services they provide in terms of telephones and telephonic services. *See, e.g., Missouri v. Purl*, 236 S.W.3d 680, 682 (Mo.Ct.App.2007) (describing a call on a "cellular phone" as a "telephone call"); *Auto-Owners Ins. Co. v. Ennulat*, 231 S.W.3d 297, 300 (Mo.Ct.App.2007) (discussing a "cellular telephone tower"); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 304, 312 (Mo.Ct.App.2005) (describing a customer of Alltel's as a "wireless telephone customer" and citing *Powertel, Inc. v. Bexley*, 743 So.2d 570, 572 (Fla.Dist.Ct.App.1999), wherein a person purchased a "cellular telephone service plan" allowing them to make "telephone calls" within the local service area). These cases lead us to the conclusion that if presented with the question before us, the Missouri Supreme Court would conclude that a cell phone is a telephone and that cell phone services are telephonic services.

Cases from other jurisdictions also support the conclusion that the ordinary definition of "telephone" includes cell phones and that a cell phone company is a telephone company. *See Sw. Bell Mobile Sys., Inc. v. Ark. Pub. Serv. Comm'n*, 73 Ark.App. 222, 40 S.W.3d 838, 842 (2001) (concluding that CMRS providers are telephone companies because they "use their assets to provide a service whereby persons who are at some distance from each other may communicate by voice in real time"); *Galloway v. Alltel Commc'ns, Inc.*, No. C99-2097, 2001 WL 34149071, at *1 (N.D.Iowa 2001) ("Alltel is a communications-related corporation which includes the sale of wireless telephone service and equipment."); *Cent. Ky. Cellular Tel. Co. v. Commonwealth of Ky.*, 897 S.W.2d 601, 603 (Ky.Ct.App.1995) ("The fact that the [cellular telephone companies] operate with technology that did not exist when the statute was adopted does not mean that they are not to be included for the purposes of [the statute]. . . . This fact does not mean that telephone companies become something else simply because they use improved communication techniques."); *Nebraska v. Robinson*, 272 Neb. 582, 724 N.W.2d 35, 62 (2006) (describing Alltel's record keeping process for "wireless telephones"); *Airtouch Comm'ns, Inc. v. Dep't of Revenue, State of Wyo.*, 76 P.3d 342, 349 (Wyo.2003) (concluding that cellular companies are telephone companies because, "[t]o most reasonable people, Petitioners' business is indistinguishable from that of a telephone company. In fact, in today's society, many people use telephone services and cellular services interchangeably" (internal quotation omitted)).

Appendix A

The cases cited by the defendants in which cell phone companies have been found to be something other than telephone companies are distinguishable. For example, Alltel's citation to an order from the Administrative Law Court in South Carolina for the proposition that Alltel is not a "telephone company" is not instructive. *See Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, Nos. 07-ALJ-17-0299-CC through 07-ALJ-17-0304-CC (Apr. 22, 2008) (order granting Petitioners' motion for summary judgment). In that case, the parties stipulated that "[t]elephones and telephone companies transmit intelligence over a vast network of wires located in public rights of way and in easements over private property." *Id.* at 10, ¶ 50. The parties also stipulated that Alltel did not have any facilities located in public rights of way. *Id.* at 10, ¶ 51. As a result, the court's conclusion that Alltel did not meet the definition of a telephone company does not compel a similar conclusion in the present case because that definition is of no binding effect here. The citation to a Missouri Administrative Hearing Commission decision from 1982 is also unhelpful. *See Mobile Radio Commc'ns, Inc. v. Dir. of Revenue*, No. RS-79-0199, 1982 WL 12037 (Mo.Admin.Hrg.Com. Dec. 16, 1982). In *Mobile Radio Commc'ns*, the administrative commission relied on a Texas Supreme Court case in which mobile radio communications were not subject to a local ordinance because the ordinance referred to transmission of voice communication "by lines and wires." *Id.* Because our analysis of whether the defendants are subject to the Springfield tax ordinance does not include stipulated definitions for telephone company or telephonic services, the cases cited by the defendants are inapposite.

Likewise, Cingular's citation to a Massachusetts case does not further its position. *See Bell Atl. Mobile of Mass. Corp., Ltd. v. Comm'r of Revenue*, 451 Mass. 280, 884 N.E.2d 978 (2008). The case is interesting, however, because Bell Atlantic Mobile took the position that it provided telephone services and was therefore a telephone company for purposes of receiving a property tax exemption. *See id.* at 984; *Bell Atl. Mobile Corp., Ltd. v. Comm'r of Revenue*, No. C269569, 2007 WL 597941, at *14 (Mass.App.Tax.Bd.2007) (Bell Atlantic defined "telephone service" as "two-way, party-to-party voice communication and data transmission"). The court reached its conclusion that Bell Atlantic Mobile was not a telephone company after considering the fact that it owned virtually none of the property eligible for the property tax exemption. *Bell Atl. Mobile*, 884 N.E.2d at 983-84. The court quickly dismissed one of its prior cases addressing the issue of whether a company that provided land-line telephone services, cable television, and Internet services, qualified as a telephone company for purposes of the property tax exemption. *See* 884 N.E.2d at 984 (discussing *RCN-BecoCom, LLC v. Comm'r of Revenue*, 443 Mass. 198, 820 N.E.2d 208 (2005)). Interestingly, in *RCN-BecoCom*, the court included dial-up Internet connections in the calculation of the financial receipts the company received from telephone service. 820 N.E.2d at 215, 216 n. 4. In so doing, the court reasoned that dial-up Internet service is analogous to the transmission of information by facsimile, which is a telephone service. *Id.* The court also noted that Digital Subscriber Line (DSL) Internet access was a telephone service, thus providing further

support for our conclusion that the definition of telephones and telephonic services is indeed broad and is not limited to any particular type of technology.

We acknowledge that tax ordinances are to be strictly construed and that if there is any doubt about the applicability of the tax, it must be resolved in favor of the taxpayer. *See Morton v. Brenner*, 842 S.W.2d 538, 542 (Mo.1992) (en banc); *Armack's Estate v. Missouri*, 561 S.W.2d 109, 111 (Mo.1978) (en banc). Nevertheless, even if we apply the strictest of definitions to "telephones" and "telephonic services," we conclude that the extrinsic evidence leaves no doubt that the phrase "telephonic services" covers cell phone services.

Alltel contends that the appropriate standard is not whether "telephonic services" is broad enough to cover CMRS but whether reasonable minds can differ on the question of whether CMRS constitutes telephonic services. Springfield's authority to tax "telephones" and "telephonic services" is not at issue, however, and we conclude that the application of the tax to the defendants is clear. The fact that Alltel can present an argument that the ordinance is susceptible to more than one interpretation does not mean that the ordinance is ambiguous. *See J.B. Vending Co., Inc. v. Dir. of Revenue*, 54 S.W.3d 183, 188 (Mo.2001) (en banc) ("the mere fact that the litigants disagree over the meaning of 'public' does not render the statute ambiguous"). That courts in other jurisdictions, applying different statutory terms and definitions to different facts, have at times concluded that a particular business is not a telephone company

does not alter our conclusion, for we find the Missouri Court of Appeals' 1999 holding that a cell phone provider could be taxed as a telephone company to be more compelling. *See City of Sunset Hills*, 14 S.W.3d at 58-59. Because we must assume that the Springfield City Council was aware of this case law when it modified the tax ordinance in 2000, we conclude that if the Council had intended that cell phone services be excluded from the tax on telephonic services, it would have made that intention clear in 2000. *See Hudson v. Dir. of Revenue, State of Mo.*, 216 S.W.3d 216, 222-23 (Mo.Ct.App.2007) ("The legislature is presumed to know the existing case law when it enacts a statute." (internal quotation omitted)). Thus, even if we assume that the tax ordinance is ambiguous and look to extrinsic evidence interpreting it, we conclude that the legislative intent to tax "telephonic services" makes the ordinance applicable to cell phone services.

C. The 2000 Recodification of the Springfield Code

The defendants argue that the 2000 modification of the tax ordinance must be given some effect. Cingular contends that it provides "telecommunications" services and that the definitions of telephonic services and telecommunications services are mutually exclusive. Furthermore, both defendants argue that they are not subject to the tax under the telecommunications language in the ordinance because Springfield's Charter authorized it to tax only telephone companies, and not telecommunications companies, and the 2000 modification of the ordinance violated the Hancock Amendment.

Appendix A

When the legislature amends a statute, we presume its intent was to change the existing law or to accomplish some legislative purpose. *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo.1998) (en banc); *Missouri v. Rousseau*, 34 S.W.3d 254, 261 (Mo.Ct.App.2000). The legislative purpose of a statutory amendment can be to clarify the law rather than change the existing law. *Andresen v. Bd. of Regents of Mo. W. State Coll.*, 58 S.W.3d 581, 589 (Mo.Ct.App.2001) (concluding that the amendment clarified the legislature's original intent to exclude academic institutions from the State Personnel Law); *Flipps Nine, Inc. v. Mo. Prop. and Cas. Ins. Guar. Ass'n*, 941 S.W.2d 564, 568 (Mo.Ct.App.1997) (concluding that the amendment to the statute was intended to clarify and particularize existing law); *Carter v. Pottenger*, 888 S.W.2d 710, 714 (Mo.Ct.App.1994) (concluding that the amendment indicated legislative intent that "personal representative" under the earlier version of the statute did not mean "a representative of a probate estate appointed under the time constraints" of another statute). We consider the legislative act in its entirety and harmonize all of its provisions if possible. *Hagan*, 968 S.W.2d at 706. If the legislature amends only part of a statute, we presume that the unamended and unchanged parts of the statute are intended to remain operative and effective. *Citizens Bank and Trust Co. v. Dir. of Revenue, State of Mo.*, 639 S.W.2d 833, 835 (Mo.1982).

The Code contains several references to "telecommunications" and "telecommunications services." Section 100-2.43 defines "telecommunications" as "the

transmission, between or among points specified by the user, of information of the user's choosing (e.g. data, video, and voice), without change in the form or content of the information sent and received regardless of the technology used." *See also* The Telecommunications Act of 1996, 47 U.S.C. § 153(43) (using substantially the same definition).

The 1999 edition of Merriam-Webster's Collegiate Dictionary defines "telecommunication" as "communication at a distance (as by telephone)." Merriam-Webster's Collegiate Dictionary 1211 (10th ed.1999). "Telecommunication" has also been defined as "communication at a distance (as by cable, radio, telegraph, telephone, or television)." Webster's Third New International Dictionary 2349 (1981).

Given these definitions, we conclude that cell phone services could be considered both telephonic services and telecommunications services. Cell phones are telephonic, as discussed above. Cell phones may also be telecommunications devices under the definition in the Springfield Code and the ordinary definition of the term because they transmit information, including voice, data, and in the case of some newer cell phones, video. Thus, the terms used in the tax ordinance are not necessarily mutually exclusive and there is no merit to the argument that cell phones are telecommunications devices and therefore cannot be taxed as telephonic devices.

This brings us to Cingular's argument that the 2000 modification must have had some purpose, to which we must give effect. *See Schoemehl v. Treasurer of Mo.*, 217 S.W.3d 900, 902 (Mo.2007) (en banc) (noting that an entire clause of a statute should not be considered excess verbiage). We conclude that the legislative intent of the 2000 recodification that added the terms "telecommunications" and "telecommunications services" was to clarify the scope of the tax ordinance, making it clear that cell phone services are telephonic services subject to the tax, and not to expand the scope of the ordinance. *See Missouri ex rel. Thomas v. Kelly*, 631 S.W.2d 685, 688 (Mo.Ct.App.1982) (when a new act supersedes an old law for the purpose of repealing conflicting or inconsistent provisions, any variation in the terminology in the new law is not as meaningful for the purpose of showing legislative intent to change the effect of the statute).

The record indicates that Springfield's recodification of § 70-452 in 2000 was not intended to be a substantive change to the scope of the ordinance. The modification occurred as part of a complete update of the Springfield Code, the purpose of which was to create an electronically searchable version thereof, eliminate inconsistencies or unclear provisions of the Code, and to identify ordinances of questionable enforceability, expired language, duplications and conflicts with state or federal law. The modification process was conducted by a private company and was specifically intended to create "non-substantive" changes in the Code unless needed to be internally consistent or consistent with

state or federal law. Mary Mannix, Springfield's Assistant Director of Finance and Comptroller, testified in her deposition that "We viewed [the recodification] as a modernization of the language." She testified further that "Anything that was a substantial change to what the ordinances that existed at the time that this was codified would have been covered by a separate city council ordinance at that time." Nancy Yendes, a Springfield city attorney, testified that the tax ordinance was not brought before the Council separately and that no one working for Springfield was aware of the updated language in the tax ordinance until after the Council approved the recodification of the entire Code. In sum, this evidence reveals that the modification of the tax ordinance was not intended to be, and was not viewed as, a substantive change to the scope of the ordinance.

The record also indicates that prior to the 2000 modification, Springfield interpreted the tax ordinance as applying to cell phone services. The original ordinance, enacted in 1944, included the phrase "telephonic services," a phrase that, despite Cingular's argument to the contrary, is broader than the term "telephone." As indicated by the definitions of these terms analyzed above, "telephonic" means something that is related to a telephone, which necessarily includes items or services that are not the physical telephone itself. The record also indicates that Springfield interpreted the tax ordinance to apply to cell phones before 2000. Yendes testified that she believed the term "telephonic" is broader than "telecommunications," and that the new language in the tax ordinance was only

included to update the ordinance with the new phraseology and clarify the scope of the ordinance.[13] Yendes also testified that she had discussions with cell phone companies, including Alltel, in the mid-to-late 90s regarding their need to comply with the tax ordinance. The fact that Springfield did not send the cell phone companies a demand letter prior to 2004 does not establish that Springfield believed that the ordinance did not apply to the defendants and, in any event, does not relieve the defendants of their obligation to pay the tax. *See Med. House, Inc. v. Dir. of Revenue*, 799 S.W.2d 80, 82-83 (Mo.1990) (en banc). Thus, we conclude that the original scope of the ordinance included cell phones, and that the legislative purpose of the 2000 modification was to clarify this interpretation and not to expand the scope of the ordinance.

The defendants argue that because Springfield referred to them as telecommunications companies in the original pleadings, it cannot succeed in taxing them under the original language of the ordinance. Springfield's pleadings do not, however, change the scope of the question before us. Springfield has always asserted its authority to tax the defendants as telephone companies. Furthermore, Count III of the Complaint seeks a declaratory judgment that "the Springfield Ordinance, which includes the terms 'telephone' and 'telephonic' applies to the Wireless Defendants' services;" and that "the Wireless Defendants

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13. Yendes testified that one way in which the 2000 modification clarified the ordinance was to draw peoples' attention to the ordinance regardless of whether they searched the Springfield Code for provisions related to telephones, telephonic services, telecommunications, or telecommunications services.

[are] liable to pay taxes under the Ordinance." Springfield's motion for summary judgment clearly argued that CMRS is subject to taxes applicable to telephones and telephonic services. Additionally, the record indicates that the district court and the parties treated the declaratory judgment as an issue of whether the defendants provide telephones and telephonic services.

The defendants also argue that Springfield's attempt to tax them exceeds the scope of Springfield's Charter. Section 18.1(3) of Springfield's Charter authorizes it to tax telephone companies. A company that provides telephones and telephonic services is a telephone company. Thus, a tax on the defendant's cell phone services, which are telephonic services, is authorized by the Charter. We need not reach the question whether the City's Charter grants it the authority to tax telecommunications companies, but we note that Springfield has the authority to tax a business and occupation that, although not specifically listed as subject to a license tax, "clearly comes within the definition and meaning of the enumerated subjects or is in fact a genus of one of the named occupations." *See City of St. Charles v. St. Charles Gas Co.*, 353 Mo. 996, 185 S.W.2d 797, 798 (1945). Whether a telecommunications company clearly comes within the definition of, or is a genus of, a telephone company is a question we leave for another day.

The defendants' final argument is that the 2000 recodification of the tax ordinance violated the Hancock Amendment to the Missouri Constitution, with the result that they cannot be taxed under the language added in

2000 or under the original language of the ordinance. *See* Mo. Const. art. X, § 22(a). Because we are not applying the language of the ordinance that was added in 2000 to the facts of this case, we do not need to reach the question whether the 2000 recodification violated the Hancock Amendment.[14] Even if the language added in 2000 was unconstitutional, a question we do not decide, we see no reason why the original language of the ordinance cannot be severed. *See* Mo. Ann. Stat. § 1.140 (allowing unconstitutional language to be severed from a statute unless "the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent"). The 2000 modification merely added language to the ordinance and did not affect the validity of the original decades-old language.[15] *See Mo. Ass'n of Club Executives v. Missouri*, 208 S.W.3d 885, 888-89 (Mo.2006) (en banc) (challenged provisions could be severed); *Weinschenk v. Missouri*, 203

14. We do note, however, that the Hancock Amendment provides for a reduction in the levy of a tax if the tax base is broadened without voter approval; it does not result in the abolition of the tax altogether. Mo. Const. art. X, § 22(a).

15. The language enacted in 1944 was "telephones and telephonic services." In 1968, the Code was updated and the "s" on "telephones" was omitted. It is unclear whether this change was intentional, but in any event, the parties have not argued that this change affects the issue before us today.

S.W.3d 201, 219-21 (Mo.2006) (en banc) (provisions were not severable). Therefore, even if the language added to the ordinance in 2000 was unconstitutional, because the defendants provide telephones and telephonic services within Springfield, they are subject to the tax ordinance.

The judgment is affirmed.

APPENDIX B — ORDER NUNC PRO TUNC OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION GRANTING SUMMARY JUDGMENT DATED JULY 3, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

Case No. 04-4099-CV-C-NKL

CITY OF JEFFERSON, et al.,

Plaintiffs,

v.

CINGULAR WIRELESS, LLC, et al.,

Defendants.

ORDER NUNC PRO TUNC

This case raises the question of whether the Plaintiff, City of Springfield ("Springfield"), can collect gross receipt taxes from the Wireless Defendants[1] for

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1. Alltel Communications, Inc. ("Alltel"); Cingular Wireless LLC and Southwestern Bell Wireless LLC (collectively, "Cingular"); and Nextel West Corporation ("Nextel") are referred to as the Wireless Defendants. Defendants SBC Communications, Inc., and Southwestern Bell Telephone, LP, are not the subject of Springfield's current Motion for Summary Judgment.

the cell phone component of their businesses. The Court concludes that Springfield's gross receipt tax ordinance is enforceable and that it applies to cell phone services just as it applies to land line telephone services. Accordingly, the Court will grant Springfield's Motion for Summary Judgment [Doc. 451] against the Wireless Defendants and enter final judgment on Springfield's claims against the Wireless Defendants pursuant to Fed. R. Civ. P. 54. It will stay Springfield's remaining claims against the SBC Defendants until further notice.

I. Background[2]

Springfield is a constitutional charter city. Its charter, which was adopted in 1953, sets forth a specific list of business categories that are subject to taxation. That list includes "telephone companies." Springfield City Charter, art. XVIII § 18.1(3) (Def. Ex. 15, p. 116).

Pursuant to its charter, Springfield enacted a gross receipts ordinance which imposes a tax on telephone services. Springfield's ordinance, as originally enacted in 1968, provided as follows:

> Every person engaged in the business of supplying telephone and telephonic service within the City shall pay as a license tax a sum equal to 6% of the gross receipts from such business.

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2. For a more complete discussion of the background of this case, see the Court's Order granting in part Alltel and Nextel's Motion to Dismiss [Doc. 476].

Appendix B

Springfield Code § 20-22 (January 2, 1968) (Def. Ex. 32). In 2000, the ordinance was amended to provide as follows:

> Every person engaged in the business of supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city shall pay as a license tax a sum equal to six (6) percent of the gross receipts from such business.

Springfield Code § 70-452 (2000) (recodified June 2, 2003) (Def. Ex. 5).

The Wireless Defendants are telecommunication companies which provide a variety of services, including cell phone services. For the purposes of this case, however, the Defendants prefer to use the term "Commercial Mobile Radio Service" ("CMRS") to describe the cell phone services which they sell. Because the Court finds that "Commercial Mobile Radio Services" are cell phones, the Court will generally refer to these devices as cell phones, mobile phones or cellular telephones.

The only remaining claim in Springfield's lawsuit against the Wireless Defendants is Springfield's request for a declaratory judgment that:

(1) The terms "telephone and telephonic services," which are contained in Springfield's gross receipts tax

ordinance, apply to the Wireless Defendants; and

(2) Each Wireless Defendant is liable to pay taxes under the ordinance.

II. Discussion

A. Do the Wireless Defendants Supply Telephone or Telephonic Services in Springfield?

Despite the voluminous briefing in this case, the primary issue to be resolved is relatively simple. Are the Wireless Defendants in the business of providing telephone services in Springfield? The Defendants claim that they or their affiliates[3] for whom they are responsible only provide CMRS in Springfield and, therefore, they are not liable to pay Springfield's gross receipts tax.

As it did in its June 9, 2005 Order, the Court concludes that the phrase "telephone and telephonic services" as used in Springfield's gross receipts tax ordinance is unambiguous and thus there is no need to resort to extrinsic evidence to interpret its meaning. *See State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo. 1987) (en

3. Cingular admits that although it does not provide mobile telephone service in Springfield itself, its affiliates do. Counsel for Cingular has further represented to the Court that it has waived any argument that it is not the proper party in interest and intends to be bound by the outcome of the suit on behalf of its affiliates who do provide cell phone service in Springfield.

banc) ("It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature.") (citations omitted); *State ex rel. Bell v. Phillips Petroleum Co.*, 160 S.W.2d 764, 769 (Mo. 1942) ("If [the statute] is clear and unambiguous, it must be construed in accordance with its manifest intent and we may not search for a meaning beyond the statute itself."). *See Cook v. Newman*, 142 S.W.3d 880, 887 (Mo. Ct. App. 2004) (en banc) ("Only when a statute's language is ambiguous or uncertain or if its plain meaning would lead to an illogical result will extrinsic matters, such as the statute's history, surrounding circumstances and objectives to be accomplished through the statute, be considered.") (citing *Riordan v. Clark*, 67 S.W.3d 610, 613 (Mo. Ct. App. 2001)).

When, as in this case, the legislative body has not defined a term or phrase at issue, the Court is required to give the words their usual and ordinary meaning. *State v. Harris*, 156 S.W.3d 817, 822 (Mo. Ct. App. 2005). In interpreting a statute enacted a number of years ago, it is appropriate to consider how words and phrases were defined around the time of the statute's enaction. *See United States v. Lachman*, 387 F.3d 42, 51 n.11 (1st Cir. 2004) (citing *Lamar v. United States*, 241 U.S. 103, 113 (1916)). Accordingly, the Court has consulted a number of older dictionary definitions of the word "telephone." Most of the dictionaries define "telephone" quite broadly. For instance, the 1969 American Heritage

Dictionary states that a "telephone" is "[a]n instrument that directly modulates carrier waves with voice or other acoustic source signals to be transmitted to remote locations and that directly reconverts received waves into audible signals; especially, such an instrument connected to others by wire." The general definition does not require that the instrument be connected to others by wire, but gives wired services as one example, suggesting that other technologies are included. The American Heritage Dictionary retained the same definition in its 1982 publication. Similarly, the 1966 Webster's Third New International Dictionary—the very dictionary that the Defendants in oral argument on Springfield's original motion stated is "the dictionary of choice . . . for the Missouri Supreme Court" (Tr. at 34)—defines the word as "an instrument for reproducing sounds esp. articulate speech at a distance."[4] Taken together, these definitions reveal that being connected to a wire is not an essential characteristic of a telephone, even if it is a common one. CMRS—which converts an acoustic source into a signal for transmission to remote locations—falls squarely within these definitions.

Even today, dictionaries continue to define telephone in substantially the same way it was done at the time the charters and the ordinances were enacted. For example, the Fourth Edition of the American Heritage

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4. The Defendants correctly pointed out during an earlier oral argument that the dictionary provides two examples of telephones, both of which include wires. However, the dictionary's explanatory notes indicate that such examples are not meant to be exhaustive. *Id.*, explanatory note 12.2.2.

Dictionary, published in 2000, defines "telephone" as "[a]n instrument that converts voice and other sound signals into a form that can be transmitted to remote locations and that receives and reconverts waves into sound signals." (Fourth Edition, 2000). The Court has also consulted what is perhaps the best indicator of common usage available: Google.com.[5] A Google search of over eight billion web pages yields over 2,170,000 results for the phrase "wireless telephone," 1,950,000 results for "cordless telephone," 1,200,000 results for "cellular telephone," and 1,340,000 for "mobile telephone." These results confirm that, even in today's age of innovation, a "telephone" need not be connected to wires. People understand that if you put it up to your ear and you speak into a microphone and someone some distance away is able to hear you, you are using a telephone.

In sum, the word "telephone," as it is commonly used, means essentially the same thing as it meant when Springfield's ordinances were adopted. Indeed, usage of the word has not changed much since 1908, when a New York court stated that "[t]he telephone is simply an instrument by which two persons may talk directly to each other." *Gilpin v. Savage*, 112 N.Y.S. 802, 805 (N.Y. Sup. 1908), *rev'd on other grounds*, 94 N.E. 656 (N.Y. 1911).

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5. Google is a comprehensive online index of over eight billion web pages. Google's index, which is updated constantly, includes pages created by individuals, organizations, businesses, and governmental entities. It is, therefore, particularly well-suited to discerning common usage of nearly any term.

Furthermore, the court's conclusion is consistent with other courts which have considered the same or analogous issues. *See City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo. Ct. App. 1999); *Airtouch Communications, Inc. v. Dep't of Revenue, State of Wyoming*, 76 P.3d 342, 349-51 (Wyo. 2003); *Southwestern Bell Mobile Systems, Inc. v. Arkansas Public Service Commission*, 40 S.W.3d 838, 843 (Ark. Ct. App. 2001); *City of Lebanon Junction v. Cellco Partnership*, 80 S.W.3d 761 (Ky. Ct. App. 2001); *Campanelli v. AT&T Wireless Services, Inc.*, 706 N.E.2d 1267 (Ohio 1999); *Central Kentucky Cellular Telephone Co. v. Commonwealth of Kentucky, Revenue Cabinet*, 897 S.W.2d 601, 603 (Ky. Ct. App. 1995).

In contrast to these other rulings, the Wireless Defendants cite the Court to *Bell Atlantic Mobile Corp. v. Comm'r of Revenue & Bds. of Assessors of 220 Cities & Towns*, 2007 WL 597941 (Mass. Appellate Tax Bd., Feb. 27, 2007). In that case, the Appellate Tax Board in Massachusetts ruled that a CMRS provider was not a "telephone company" based on its determinations that "wireless and wired, land-line communications are separate technologies, each with a distinct history and development." *Id.* at *10. However, the precise issue in that case was "whether Bell Atlantic Mobile is a 'telephone company' whose 'machinery, poles, wires and underground conduits, wires and pipes' must be centrally valued" for purposes of a particular tax exemption that Bell Atlantic was claim. Bell Atlantic essentially argued

> that it is a telephone company because it provides telephone service, which it defines as two-way, party-to-party voice communication and data transmission. Because, in its view, it uses equipment similar to wired telephone companies to provide a service that crosses municipal boundaries, Bell Atlantic Mobile maintains that it is a telephone company for purposes of [the exemption].

Id. at *14. However, the valuation scheme under the tax code in that case pertained specifically to the instrumentation used by the company, e.g., underground conduits, wires, and pipes, none of which described the equipment relied on by Bell Atlantic to provide its services. A tax ordinance, like any other ordinance, has to be read as a whole to determine the intent of its drafters, so it is not surprising that the Massachusetts Appellate Tax Board did not characterize Bell Atlantic as a telephone company when the exemption included specific qualifiers that Bell Atlantic did not fit. Given Bell Atlantic's own insistence that it was a "telephone company," and the limiting language here that is not present in Springfield's ordinance, the Massachusetts Tax Court's interpretation of the word "telephone" does little to advance the Wireless Defendants' arguments that they do not provide telephone services.

Of the cases that have concluded that cell phone providers were in the telephone business for purposes of municipal tax ordinances, *City of Sunset Hills* is

particularly important given this Court's obligation to follow the law of the State of Missouri. The Missouri court clearly believed, as does this Court, that a Commercial Mobile Radio Service is a telephone:

> The services Southwestern Bell provided clearly fell within the definition or genus of a telephone company. First, in its brief, Southwestern Bell labeled its business "wireless communications services" which it described as "transmitting radio signals between [its] antennae located at fixed sites throughout its service area and the mobile units—commonly called cell phones, car phones, or mobile phones—used by its customers." Southwestern Bell's own characterization of its services as transmitting signals to "phones" placed its services within a class of telephone companies enumerated in the statute.

14 S.W.3d 54, 59 (Mo. Ct. App. 1999); *see also City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 187 (Mo. 2006) (noting that the Missouri Court of Appeals "found it absurd to deny that companies providing 'wireless communications services' were a part of the class of 'telephone companies' subject to a telephone business license fee" in *City of Sunset Hills*).

This is not to say that telephone technology has not progressed since Springfield's ordinances were adopted. To the contrary, many significant advancements have

occurred. The rotary dialing system has given way to tone dialing. Satellite technology enables customers to place calls to other continents, while cordless technology enables them to do so from their backyards. Twisted copper telephone wires are being replaced with fiber optics. Each of these new technologies could be described in technical terms that may sound quite unlike our current understanding of telephone services. But that does not change the fact that these technologies, just like "Commercial Mobile Radio Services," are created by "telephone" companies to provide what we all think of as "telephonic services."

If the Wireless Defendants' approach were adopted, then each time a new technology were incorporated into an existing service or product, the ordinances and charters of each city would have to be changed or no taxes could be collected. At some point on the spectrum, innovation might be so extreme as to alter the very function of the disputed product or service. The mobile telephone, however, is the functional equivalent of land line based telephones, which have existed for more than a hundred years. Thus, the Court again concludes that the term "telephone" and "telephone services" in Springfield's charter and ordinance is generic enough to encompass the Wireless Defendants' "Commercial Mobile Radio Services."

Since the Court's initial determination in its June 9, 2005 Order, the Wireless Defendants have attempted to recast the issue by arguing that "the question presented, is not whether the phrase 'telephonic service'

is 'broad enough and flexible enough to include' CMRS, but whether there is 'any doubt' that 'telephonic service' applies to CMRS: if there is, the Court must hold that CMRS is not covered by the Ordinance." Alltel's Suggestions in Opposition at 1 [Doc. # 468]. In support of this new standard, the Wireless Defendants cite numerous Missouri cases and treatises on the power of municipalities to levy taxes. *See, e.g., City of Raytown v. Kemp*, 349 S.W.2d 363, 366 (Mo. 1961) (en banc) ("[I]n case of doubt the power to tax is denied."); *Kansas City v. Frogge*, 176 S.W.2d 498, 501 (Mo. 1943) ("all doubts will be resolved against its exercise, and in favor of the taxpayer" (quotation marks and citation omitted)); *City of St. Charles v. St. Charles Gas Co.*, 185 S.W.2d 797, 798 (Mo. 1945) ("If there is a doubt as to the delegation and existence of the [taxing] power the doubt must be resolved against the city . . . ."); see also 16 McQuillin, The Law Of Municipal Corporations § 44.05, at 29-30 (3d ed., rev. vol. 2003) ("[I]f there is a doubt as to the existence of the power, such doubt will be resolved against the municipality and in favor of the taxpayer."). However, as Springfield notes in its Reply, the cases cited by the Wireless defendants speak to the authority of a city to tax, an issue which is not in dispute in this motion. The instant case concerns the interpretation of Springfield's ordinance and whether it may be applied to the Wireless Defendants' CMRS technology, not whether Springfield has the power to levy a gross receipts tax in the first place. Moreover, it is clear that this tax applies to telephone services and CMRS are telephone services, as demonstrated by the many cases which have so found.

Appendix B

In a final attempt to render the otherwise unambiguous language of the ordinance susceptible to other meanings, the Wireless Defendants offer the Court extrinsic evidence including the deposition testimony of Springfield's managers, Springfield's history of non-enforcement of the tax ordinance on some cellular phone providers, and expert reports on the ambiguity of the word "telephone" in tax statutes. But such extrinsic evidence would only be relevant to the ordinance's construction if the word "telephone" or "telephonic services" were ambiguous. As the Court has already explained, "telephone and telephonic services" is unambiguous and the Court may not look to extrinsic evidence to create an ambiguity where none exists. *See State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987) (when confronted with an ordinance that is plain and unambiguous, courts do not look to legislative history as a guide to its meaning); *State ex rel. Bell v. Phillips Petroleum Co.*, 160 S.W.2d 764, 769 (Mo. 1942) (if the statute is "clear and unambiguous," the court may not "search for meaning beyond the statute itself."). It would certainly create mischief if a word like telephone is found to be so ambiguous that discovery would be proper of every city manager or city council person who had passed or administered an ordinance that contains such a generic term.

B. Springfield's Other Arguments

Alltel raises the following additional arguments in opposition to summary judgment by reference to earlier briefing: (1) the Ordinance exceeds the City's charter authority; (2) the Ordinance violates the Hancock Amendment; (3) the Order was passed in violation of the City's own laws and Missouri's general tax laws; and (4) the Order is unconstitutionally vague. However, although Alltel refers the Court generally to Documents Nos. 108, 145, 146, 202, 208, 454, 455, 456, 459, and 460 in support of these four arguments, it does so without specific reference to page numbers or even which arguments are found in which pleadings. The Court briefly addresses each issue fairly raised by Alltel and incorporates by reference its Order of June 9, 2005, to the extent it addressed those issues in greater detail.

1. The City's Charter Authority

Alltel has argued in its previous pleadings that Springfield's Gross Receipts Ordinance exceeds the scope of its charter authority. Specifically, the Wireless Defendants argue that Article 18, Section 18.1 of the city charter only authorizes Springfield to impose a license tax upon "telephone" companies, and makes no mention CMRS or "telecommunications" companies. As the Court has already ruled that the Wireless Defendants provide telephone service and are therefore telephone companies, Springfield is well within the authority granted by its charter to impose a gross receipts tax on them.

2. The Hancock Amendment

The Wireless Defendants also contend that the 2000 amendment to Springfield's gross receipts tax ordinance adding the words "telecommunications" and "telecommunications services" violates the Hancock Amendment to the Missouri Constitution. As the Court has explained, the cell phone service provided by the Wireless Defendants falls within the unambiguous definition of "telephone and telephonic service," both of which were included in the gross receipts tax ordinance long before passage of the Hancock Amendment. As Springfield has limited its Count for Declaratory Relief to the applicability of the "telephone and telephonic services" clauses of the gross receipts tax, the Hancock Amendment defense is inapplicable and fails as a matter of law.

3. Compliance with State and City Tax Laws

The Wireless Defendants argue that Springfield failed to comply with various Missouri tax collection statutes, including Mo. Rev. Stat. §§ 136.076, 136.365, 32.053, and 143.903. However, these statutes do not apply to constitutional charter cities. Chapter 136, as its title indicates, applies to "Collection of State Taxes." Chapter 32 applies to the "State Department of Revenue." And Chapter 143 applies to State "Income Tax." None of these statutes contains language suggesting that it applies to constitutional charter cities such as Springfield; nor have the Defendants cited a case in which any of these statutes were applied to

constitutional charter cities. Instead, they directed the Court to *City of Manchester v. Southwestern Bell Telephone*, No. 04-CV-1308, slip op. (E.D. Mo. Apr. 28, 2004), which held that third and fourth class cities are required to collect taxes in the same manner as the State of Missouri. However, Missouri Revised Statute §§ 94.150 and 94.310 (1998), which only apply to third and fourth class cities, specifically provide that those cities are required to follow state tax collection procedures.

In contrast, Springfield, as a charter city, is governed by § 94.310, for purposes of tax collection. In that section, unlike §§ 94.150 and 94.130, there is no requirement that a charter city must collect taxes in the same way as the State. Given the rule of statutory construction, *inclusio unius est exclusio alterius*, the only reasonable interpretation of Missouri State law is that charter cities are not required to follow state tax collection procedures.

The Wireless Defendants also argue that Springfield did not follow its own ordinances when adding the telecommunications language to the gross receipts tax ordinance in 2000. Even assuming Springfield failed to comply with its own ordinances for passing new legislation in 2000, the Court's ruling today implicates only the "telephone" language of the tax ordinance, which has been in place for decades. Thus, any noncompliance with city ordinances in amending the tax code in 2000 to include telecommunications is irrelevant to the declaratory relief Springfield seeks in the pending motion.

4. Vagueness

The Wireless Defendants conflate vagueness and ambiguity in several of their briefs, each time arguing for a construction of Springfield's tax ordinance that excludes cell phone service. The Court has already concluded that the ordinance, specifically the terms telephone and telephonic service, are not ambiguous. As for vagueness, "[a] statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Bd. of Educ. of St. Louis v. State*, 47 S.W.3d 366, 368-369 (Mo. 2001) (quoting *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 515 (Mo. 1999)). The burden to prove a statute unconstitutional is upon the party bringing the challenge, and the standard for determining whether a statute is void for vagueness is whether the terms or words used are of "common usage and are understandable by persons of ordinary intelligence." *Id.* (quoting *State v. Mahurin*, 799 S.W.2d 840, 842 (Mo. banc 1990)). As the Court has held above, "People understand that if you put it up to your ear and you speak into a microphone and someone some distance away is able to hear you, you are using a telephone." *Supra* at 6. The Wireless Defendants have not met their burden to establish that the word "telephone" when applied to cell phone service is so vague as to violate the Constitution.

C. Liability for Gross Receipts Tax

Springfield's Gross Receipts Tax Ordinance provides, "Every person engaged in the business of supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city shall pay as a license tax a sum equal to six (6) percent of the gross receipts from such business." Springfield Code § 70-452 (2000) (recodified June 2, 2003). As the Court just explained, the words "telephone" and "telephonic services" unambiguously include the Wireless Defendants' CMRS technology. None of the Defendants have challenged, in their Suggestions in Opposition to Springfield's current Motion for Summary Judgment, Springfield's assertion that some calls made by customers of the Wireless Defendants occurred "within the city" of Springfield. Further, all the Wireless Defendants admit that Springfield has demanded payment for the gross receipts tax for such calls but that Defendants have not paid. The Court therefore concludes that the Wireless Defendants are liable for some amount of gross receipts taxes and Springfield is entitled to judgment as a matter of law on its claim for declaratory relief.[6]

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6. There is clearly a factual dispute about the amount of gross receipts taxes which are due but there is no factual dispute about the Wireless Defendants' legal obligation to pay the gross receipts tax.

D. Monetary Damages

In its Count for declaratory relief in its Amended Complaint, Springfield asks for "all further relief as the Court may deem proper and just pursuant to 28 U.S.C. § 2202, including monetary damages for unpaid taxes, and penalties and interest." Am. Compl. ¶ 84. Contemporaneous with this Order, however, the Court has dismissed Springfield's tax collection claim because of Missouri's exclusive tax remedy doctrine. Awarding damages to effectuate its declaratory judgment action where Springfield's claim for tax collection has been dismissed for failure to state a claim would be an impermissible end run around the strictures of the exclusive tax remedy doctrine. In addition, the Court has insufficient evidence to determine the amount of taxes owed by each of these Defendants. That is a fact-intensive inquiry which must be taken up through Springfield's administrative process.

Therefore, to the extent Springfield is asking the Court to declare the amount of taxes due for each Wireless Defendant, its request for summary judgment is denied, and any such claim is dismissed for the same reasons discussed in this Court's contemporaneous Order [Doc. 476].

Appendix B

E. Final Judgment

With this Order, the Court has disposed of all of Springfield's claims against the Wireless Defendants and all of the Wireless Defendants' counterclaims against Springfield. Although there are claims remaining between Springfield and the SBC Defendants precluding a final judgment as to them, the Court finds that it is appropriate to direct an entry of final judgment as to all claims by Springfield against Alltel Communications, Inc.; Cingular Wireless LLC; Southwestern Bell Wireless LLC; and Nextel West Corporation, and all counterclaims by those Wireless Defendants against Springfield.

Pursuant to Fed. R. Civ. P. 54, the Court finds there is no just reason to delay appellate review of Springfield's claims as to Alltel Communications, Inc.; Cingular Wireless LLC and Southwestern Bell Wireless LLC; and Nextel West Corporation, and final judgment is entered as to those Defendants. The Court stays Springfield's claims against the SBC Defendants until further ordered.

III. Conclusion

Accordingly, it is hereby

ORDERED that Plaintiff City of Springfield's Motion for Summary Judgment [Doc. # 451] is GRANTED. It is further

ORDERED that any request by Springfield for monetary damages in Count III of its Second Amended Complaint is DISMISSED for failure to state a claim for the same reasons that the Court dismissed Count I of Springfield's Complaint. It is further

ORDERED that Springfield's claims against Alltel Communications, Inc.; Cingular Wireless LLC; Southwestern Bell Wireless LLC; and Nextel West Corporation, and their counter claims against Springfield, are final pursuant to Rule 54b. It is further

ORDERED that all other proceedings in this case are STAYED until further order of the Court.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: July 3, 2007
Jefferson City, Missouri

APPENDIX C — ORDER NUNC PRO TUNC OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION DENYING MOTIONS TO DISMISS DATED JULY 3, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

Case No. 04-4099-CV-C-NKL

CITY OF JEFFERSON, et al.,

Plaintiffs,

v.

CINGULAR WIRELESS, LLC, et al.,

Defendants.

ORDER NUNC PRO TUNC

The City of Springfield ("Springfield") levies a gross receipts tax on all "telecommunications and telephonic services" supplied "within the city" of Springfield. *See* Springfield Municipal Ordinance § 70-452. Because the Defendants, Alltel Communications, Inc., Nextel West Corporation, Southwestern Bell Wireless LLC, and Cingular Wireless LLC ("Defendants"), take the position that commercial mobile radio services ("CMRS") are not "telecommunications and telephonic

services," they do not pay gross receipts tax on cell phone[1] services that they provide in Springfield.

In April 2004, Springfield's counsel sent a demand letter to these Defendants requesting payment of five years' worth of gross receipts taxes. The letter stated that if payment was not received by April 29, 2004, Springfield would proceed with all legal remedies. When the Defendants did not comply, Springfield filed the present lawsuit on May 12, 2004, to collect the taxes due.

Soon after filing suit, Springfield moved for partial summary judgment to determine whether Southwestern Bell Wireless, LLC, Nextel West Corp., Alltel Communications, Inc., and Cingular Wireless LLC were liable to pay Springfield's gross receipts tax. On June 9, 2005, the Court found that cell phones are "telecommunications and telephonic services," within the meaning of Springfield's gross receipts ordinance. It also held that the uncontroverted facts show that Southwestern Bell Wireless, LLC, Nextel West Corp., Alltel Communications, Inc., and Cingular Wireless LLC, furnish some telephone services within the City of Springfield and obtain revenue as a result. Based on these findings, the Court held that each Defendant owed Springfield some amount of gross receipts tax for the

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1. Commercial mobile radios are commonly referred to as cell phones, both by lay people and the telecommunications industry. That is the term the Court will use in the remainder of the Order, unless referring to the Defendants' use of the term, CMRS.

relevant time period. The Court reserved judgment on the amount of taxes due or how that amount would be determined because those issues were not raised by Springfield's Motion for Partial Summary Judgment.

The Court entered its June 9, 2005 Order after considering all arguments raised by the parties, including the Defendants' arguments in support of their counterclaims and defenses. The Court specifically rejected the Defendants' argument that Springfield's taxing ordinance did not comply with the Hancock Amendment and violated the Mobile Telecommunications Sourcing Act. It ruled that Springfield's gross receipts tax is not a disguised sales tax even though it is levied in part on sales made to Defendants' customers. It found that Springfield was not required to comply with the Missouri tax collection statutes. Finally, it concluded that Missouri law would permit Springfield to determine whether the Defendants were liable to pay a gross receipts tax in a court proceeding prior to commencement of an administrative collection process.

After the Court entered its Order on June 9, 2005, the Missouri General Assembly passed HB 209 which required Springfield to dismiss its lawsuit against the Defendants. Springfield sought a ruling in state court to determine the constitutionality of HB 209. At the request of the Defendants, the Court stayed this litigation pending the outcome of Springfield's constitutional challenge. After the Missouri Supreme

court struck down HB 209 as unconstitutional,[2] the stay was lifted.

After the stay was lifted, Alltel moved to dismiss this case for lack of subject matter jurisdiction. Alternatively, Alltel asked the Court to abstain. In its order of October 17, 2006, the Court denied Alltel's motion to dismiss for lack of subject matter jurisdiction, but concluded that Springfield's ordinance did not authorize Springfield's tax collection claim because of Missouri's exclusive tax remedy doctrine.[3] The Court, therefore, dismissed Springfield's claim for tax collection, but did not vacate its earlier order finding that the Defendant's were liable to pay Springfield's gross receipts tax. The parties had fully litigated that issue, thereby effectively amending the pleadings.[4] In addition, the Court concluded that

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2. *See City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo.2006).

3. The "exclusive tax remedy doctrine" merely provides that both a taxing authority and taxpayer must use the remedies provided by statute to collect or dispute taxes if there is an adequate remedy provided *See* discussion *infra*.

4. While Springfield's original Complaint did not separately request a declaratory judgment on the issue of liability, the record shows that this issue was raised by Springfield in its Motion for Partial Summary Judgment and joined by the Defendants in their Opposition to Springfield's Motion for Partial Summary Judgment and by their own counterclaims. Therefore, pursuant to Federal Rule of Civil Procedure 15, the Court treated Springfield's Motion for Partial Summary Judgment as a request for a declaration of law on

(Cont'd)

Missouri's exclusive tax remedy doctrine would not be violated by a declaratory judgment that addressed only the question of whether the Defendants were subject to Springfield's gross receipts tax ordinance.

Alltel then complained that it had not had a fair opportunity to litigate the propriety of a declaratory judgment in this case. In response, the Court vacated its order of June 9, 2005,[5] and permitted Springfield to amend its Complaint to add a separate claim for declaratory judgment. Alltel and Nextel have now filed Motions to Dismiss Springfield's Amended Complaint [Doc. 457 and Doc. 452 respectively].

In Count I of Springfield's Second Amended Complaint, Springfield seeks to collect past due gross receipts taxes from the Defendants. In Count II, it seeks a declaratory judgment that Springfield's gross receipts tax ordinance applies to the cell phone services which Defendants provide within the city limits of Springfield and that all Defendants are liable to pay taxes under the ordinance. Only Alltel and Nextel have filed motions to dismiss these claims. The other Defendants have

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(Cont'd)

Defendants' liability under Springfield's gross receipts tax. Rule 15(b) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

5. It also hereby vacates its Order of October 17, 2006. That Order and the June 9, 2005 Order are the only two substantive orders that the Court has previously entered in this case.

previously declined an invitation by the Court to dismiss Springfield's tax collection claim based on Missouri's exclusive tax remedy doctrine.[6]

For the following reasons, the Court dismisses without prejudice Springfield's claim for tax collection (Count I) but denies Alltel and Nextel's Motion to Dismiss Springfield's claim for declaratory judgment (Count II).

I. Count I—Tax Collection Claim

Alltel and Nextel argue that the Court has no subject matter jurisdiction over Springfield's claim for tax collection because of Missouri's exclusive tax remedy doctrine, which was first articulated in *State ex rel. Hayes v. Snyder*, 139 Mo. 549, 552 (Mo.1897). In that case, Jackson County Collector Hayes sued the previous owners of a parcel of real estate to collect a personal judgment against them for taxes assessed against the property while they had owned it. The Missouri Supreme Court held that the state's exclusive remedy was to impose a lien on the property for which back taxes were due. *Id.* at 554-55. In reaching this conclusion, the state supreme court reasoned that:

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6. The posture of this case is quite unusual in that it is a local taxing authority that seeks to invoke the subject matter jurisdiction of the federal court to collect its taxes and to resolve the meaning of its tax ordinance. This may explain why only two of the Defendants have filed motions to dismiss. It is unusual for a taxpayer to have a federal forum to contest the validity of a tax imposed by a municipality.

> [a] tax is not a debt in the ordinary sense of that term, as it is not founded upon contract, and as a general thing a debt cannot be created in any other way. Tax proceedings are *in invitum*. The tax is an impost levied by authority of the government for the support of the state, and has none of the characteristics of a contract, the essence of which is an agreement expressed or implied. Therefore, if the statutes of this state make special provisions for the collection of taxes against real estate, and do not apparently contemplate that any others will be necessary, the mode of collection prescribed by statute is exclusive.... [W]here the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie. This is the generally accepted doctrine, though there are exceptions to this general rule; for instance, where right to bring suit is expressly given by statute, or where the implication of an intent to give a remedy by suit may be so strong as to be conclusive, as where the statute provides for a tax, but is silent as to the method of collection.

Id. at 553-54 (internal quotations omitted).

In *Kansas City v. Field*, the Missouri Supreme Court again held that "a statutory remedy for the collection of a tax or a special assessment, whether it be by distress or by action, is an exclusive remedy." 285

Mo. 253, 274 (Mo.1920). *Accord City of St. Louis v. United Rys. Co.*, 174 S.W. 78 (Mo.1914) (where an ordinance provides a method for enforcing a tax, it will be held to be exclusive); *State ex rel. Steed v. Nolte*, 138 S.W.2d 1016 (Mo.1940) (en banc) (holding that for tax collection purposes, the city must use the collection procedures set forth in applicable law) Although these Missouri cases are old, Springfield has offered no authority to suggest that Missouri no longer recognizes the exclusive tax remedy doctrine articulated in *Hayes*.

Springfield's ordinances give it a specific mechanism for collecting past due gross receipts taxes. They provide that:

> Every person required to pay the license tax levied by this article shall cause to be filed with the director of finance on January 15, April 15, July 15 and October 15 of each year a true statement, under oath, of the gross receipts of such business for the three calendar months preceding the filing of such statement. The director of finance and his authorized agents may investigate the correctness and accuracy of such quarterly statements, and for that purpose shall have access at all reasonable times to the books, documents, papers and records of the licensee.

Id. § 70-454. If a person refuses to pay any tax, the Director may estimate the delinquent taxes and make an assessment based on that estimate. *Id.* § 70-154.

After the Director notifies the taxpayer of the assessment plus penalties including interest, the taxpayer has ten days to request a hearing to contest the assessment. *Id.* § 70-152.

In the event a hearing is requested, "[t]he director, employee of the city, or hearing officer appointed by the city manager shall hear the case and make a determination in accordance with the provisions of RSMo ch. 536." *Id.* at § 70-155. "Such hearing need not be conducted according to the rules of evidence." *Id.* The director is empowered to subpoena witnesses or to issue subpoenas duces tecum for any book, paper, record or memorandum. *Id.* "The decision of the hearing officer . . . shall be in writing and shall be subject to appeal under RSMo ch. 536." *Id.* § 70-156. If the delinquent taxpayer fails to pay the assessment after the decision becomes final,

> the license of such person shall be revoked without further hearing five days after the director mails such person a notice that the license has been revoked, unless the person pays the city the delinquent assessment, including penalties and interest to date, which money shall be held for possible refund by the director while the decision is on appeal. Revocation of such license pursuant to the provisions of this section is not appealable, and such license may only be reinstated by the person paying to the director the money due on the assessment, including all penalties and interest to date.

Id. § 70-157.

Appendix C

Reading together all portions of Springfield's Municipal Code chapter 70, the Court concludes that the Code provides a remedial scheme for the collection of delinquent gross receipts tax. Enforcing the ordinance is the responsibility of the City's Director of Finance. All licensees must file quarterly gross receipts reports with the City, which the Director is authorized to investigate and verify. If the licensee refuses to do so, the director may issue subpoenas and demand to inspect records under penalty of revocation of the license. If the Director determines that a licensee had failed to pay its tax obligation, she "shall notify such person of this determination, which determination shall be an assessment of the license fee or tax which is due and owing, plus all penalties including interest." *Id.* § 70-152. That assessment becomes final ten days after it is delivered to the licensee unless the licensee requests a hearing. If a hearing is requested, the Director or a hearing officer "shall hear the case and make a determination in accordance with the provisions of RSMo ch. 536." *Id.* at § 70-155. That determination becomes final after 30 days and may be appealed under Mo.Rev.Stat. ch 536. However, if the licensee fails to pay after the final determination, its license "shall be revoked without further hearing . . . unless [and until] the person pays the city the delinquent assessment." *Id.* § 70-157.

Springfield's code provides a method for assessing gross receipts tax and the administrative process

appears to be adequate for purposes of tax assessment.[7] While Alltel has refused to file the reports needed to make an assessment, Springfield has the power to make an estimate based on the information available to it. The record shows that Alltel has reported gross receipts revenue collected from customers having a "principal place of use" within the city. While this may not include all revenue subject to gross receipts tax, Springfield has the power to estimate the actual tax due. If Alltel contests the tax, Springfield can subpoena all of Alltel's records. Pending appeal, Springfield can force Alltel to pay the taxes "in escrow" or require Alltel to stop doing business in Springfield.

Springfield has failed to show that it cannot use this administrative process to assess the taxes which it claims are owed by the Defendants. Its tax collection claim must therefore be dismissed. However, contrary to the intimation of Nextel and Alltel, the Court has never found that it lacks subject matter jurisdiction to hear Springfield's claim for tax collection. There is diversity jurisdiction to address Springfield's claim, and Missouri's exclusive tax remedy doctrine cannot divest a federal court of its jurisdiction. Therefore, the Court's dismissal of Springfield's tax collection claim is not because subject matter jurisdiction is lacking. Instead, the dismissal is because Missouri law does not recognize Springfield's claim for tax collection prior to assessment. *See State ex rel. Hayes v. Snyder*, 139 Mo. 549, 552 (Mo.1897).

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7. While Springfield's ordinance is adequate to assess taxes against the Defendants, it is not adequate to resolve the applicability of these taxes to the Defendants when the dispute is one of statutory interpretation. *See discussion infra.*

Appendix C

While dismissals under Rule 12(b)(6) are generally with prejudice, the Court is uncertain how a dismissal would be used in subsequent litigation between these parties. Given the contorted procedural history of this dispute, the Court makes this dismissal without prejudice.

II. Count II—Declaratory Relief

In Count II, Springfield asks the Court to declare that Defendants' cell phone services provided within the city limits of Springfield are subject to Springfield's gross receipts tax ordinance and, therefore, all Defendants are liable for past due taxes. As with Count I, Alltel and Nextel seek to dismiss this claim for lack of subject matter jurisdiction. Their primary argument is that Missouri's exclusive tax remedy doctrine applies to Springfield's declaratory judgment claim and Missouri's exclusive tax remedy doctrine is jurisdictional. Alltel and Nextel also argue that Springfield has not exhausted its administrative remedies and therefore cannot obtain even a declaration that its tax laws apply to the Defendants. They state these arguments in many different ways, but all turn on the question of whether Missouri law would permit Springfield to obtain a judicial declaration interpreting its tax ordinance before requiring Springfield to begin its administrative process to assess taxes.

Appendix C

A. Missouri Law

The Court finds that Missouri law permits Springfield to seek a judicial determination that its ordinance applies to a specific taxpayer before Springfield begins its administrative assessment process. As a practical matter, the administrative process created by Springfield is not adequate when a question of statutory interpretation is at the heart of the dispute between the City and its taxpayers. It does not serve the interest of either a taxpayer or the taxing authority to go through an expensive administrative process to resolve the amount of taxes owed, if no taxes can be collected because the statute does not apply to the taxpayer and, therefore, no taxes are due.

Even if a Springfield administrator can enter an order that the taxes are due,[8] legal review of that ruling could not occur until the administrative process is completed. By that time, both parties have expended significant resources resolving the amount of taxes due, only to learn on judicial review that the ordinance did not cover the services for which the taxes were sought.

Other jurisdictions which recognize similar exclusive tax remedy doctrines have permitted court actions under these limited circumstances. When there is a question of statutory interpretation, these jurisdictions will permit court action to determine the applicability

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8. The parties dispute whether Springfield's Finance Director has such authority under Missouri law.

of the tax to a business operating within the jurisdiction. *See* M.L. Cross, Annotation, *Tax Questions as Proper Subject of Action for Declaratory Judgment*, 11 A.L.R.2d 359 (Supp.2005).

While the Court has been unable to locate a Missouri case directly on point, in other contexts Missouri courts have permitted legal issues to be resolved in court even when administrative remedies were not exhausted. The practical considerations discussed in those cases, e.g., *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234 (Mo.1997), are equally applicable when there is a dispute about whether a tax is owed. Furthermore, the Missouri Supreme Court in *Nicolai v. City of St. Louis*, 762 S.W.2d 423 (Mo. banc 1989), tacitly approved the use of a declaratory judgment to test the authority of a local taxing authority to collect a tax even when administrative procedures had not been exhausted.

This case is a good example of when significant factual disputes may be avoided if the threshold issue of applicability is resolved first. The initial dispute between the parties is whether Springfield's gross receipts tax ordinance applies to companies that provide cell phone service, as opposed to land line services. Defendants claim that they do not provide telephone services within the meaning of Springfield's ordinance, but the unrefuted evidence is that they do provide "Commercial Mobile Radio" services in the city limits of Springfield. If the Defendants are correct in their interpretation of the City's ordinances, then no taxes

are owed to Springfield and all parties can avoid the cost of an expensive administrative assessment action.

For these reasons, the Court concludes that Missouri law permits a taxing authority to obtain a judicial interpretation of its tax ordinance to determine whether a taxpayer is subject to it. Likewise, a Missouri court would not require administrative exhaustion before that issue is presented to a court. The old Missouri cases discussing the exclusive tax remedy doctrine do not discuss whether a declaratory judgment is proper or improper under these circumstances and more recent case law indicates that a declaratory judgment under these circumstances does not violate the exclusive tax remedy doctrine. While Springfield did not create a specific claim for tax collection in its ordinances, Missouri law has authorized declaratory judgments for many years. Therefore, the silence in Springfield's tax ordinance concerning declaratory judgments does not establish that declaratory judgments are impermissible in this context.

B. Subject Matter Jurisdiction in Federal Court

Although the Court has found that Missouri law would permit a state court to hear Springfield's claim for declaratory judgment, the Court must also determine whether that claim can be heard in a federal court, given the special deference which federal courts show to state and local taxing authorities.

Appendix C

Nextel and Alltel argue that even if a state court could hear Springfield's claim, a federal court does not have subject matter jurisdiction to do so. Many of their arguments about federal subject matter jurisdiction are dependent on their assumption that Missouri state courts would not permit Springfield's declaratory judgment action because of Missouri's exclusive tax remedy doctrine. For example, they argue that the Court does not have subject matter jurisdiction because *Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938), requires a federal court to apply state law in a diversity action. Because the Defendants assume that Missouri would not permit Springfield's declaratory judgment action, they conclude it would be an *Erie* violation for the federal court to hear Springfield's claim and, therefore, the Court lacks subject matter jurisdiction. Similarly, they argue that a federal court does not have subject matter jurisdiction over any issue that has been committed for initial decision to an administrative body. *See Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 241 (1952). They also contend that there is no federal subject matter jurisdiction because Springfield has an adequate remedy at law. Each of these arguments, however, necessarily fails if Missouri law recognizes Springfield's declaratory judgment claim and does not require Springfield's declaratory judgment claim to be administratively exhausted first.

Because the Court has diversity jurisdiction and has already found that Missouri law would authorize Springfield's declaratory judgment, it rejects Defendants' contention that this Court lacks federal

subject matter jurisdiction to hear Springfield's declaratory judgment claim. Indeed, the Court's subject matter jurisdiction seems evident given the fact that a similar issue also grounded in Missouri law was litigated all the way to the United States Supreme Court. *See City of St. Louis v. United Railways Co. of St. Louis*, 174 S.W. 78, 82 (Mo.1915).

C. Justiciability

Defendants also argue that there is a no case or controversy before the Court. Yet, Defendants have refused to pay Springfield's tax, and Springfield claims that the taxes are owed. Springfield seeks a declaration that the ordinance covers the Defendants' conduct, and the Defendants are liable to pay the tax. There is little difference between this claim and one where an insurance company seeks a declaratory judgment that there is not insurance coverage. Such claims are routinely heard in the federal court.

Furthermore, any judgment in this case is not advisory as argued by the Defendants. The Defendants would not have fought so vigorously if a judgment here would be of no consequence. The fact that the Missouri legislature actually passed a statute to require Springfield to dismiss this lawsuit suggests that the consequences of the case are not ephemeral.

D. Venue

Nextel and Alltel argue that this case should not have been filed in the Central Division of the United States District Court for the Western District of Missouri because there is no divisional venue. Venue, however, is determined at the time a lawsuit is filed. At the time this suit was filed, there was divisional venue in the Central Division because Jefferson City was also a named plaintiff. The relevant Defendants have settled their dispute with Jefferson City, but that does not alter the venue of the Court to hear the claims of Springfield, the co-plaintiff. Any trial concerning those claims will be held in Springfield at the request of the Defendants.

E. Missouri versus Federal Declaratory Judgment Acts

The Defendants' arguments concerning the applicability of the Missouri and federal Declaratory Judgment Acts are rejected summarily. The Court has already held that for purposes of this declaratory judgment action, Springfield does not have an adequate remedy at law. Furthermore, the federal Declaratory Judgment Act controls here. *Farmers Alliance Mutual Ins. Co. v. Jones*, 570 F .2d 1384, 1386 (10th Cir.1978); *Ohio Casualty Ins. Co. v. Marr*, 98 F.2d 973, 975 (10th Cir.1938); *Amerilink Corp. v. Cerco, Inc.*, 1996 U.S. Dist. LEXIS 6207 (E.D.Mo.1996); *Haagen-Dazs Shoppe Co., Inc. v. Born*, 897 F.Supp. 122, 126 (S.D.N.Y.1995); *Committee for Educational Equality v. State*, 878 S.W.2d 446, 452 (Mo.1994), and it does not require proof

that there is no adequate remedy at law. In addition, as previously explained, Missouri law would permit a declaratory judgment had this case been filed in state court.

F. Abstention

Early in this case, the Court asked the parties why a local tax case was in federal court. At that time, no one stood up and asked the Court to abstain. The parties were apparently content to have this dispute resolved in federal court. However, now that the Court has decided that the Defendants are subject to Springfield's tax, Alltel and Nextel have decided that the Court does not have subject matter jurisdiction to even address the merits of the dispute, and if it does have subject matter jurisdiction, the Court should abstain.

1. Judicially Created Abstention

In support of their abstention argument, Alltel and Nextel cite a number of federal cases that suggest that abstention is appropriate when a local tax dispute is raised in a federal court. For example, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the United States Supreme Court held that federal courts should abstain if they are asked to enjoin or declare invalid a state tax. *Also see Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981) (discussing when abstention is appropriate if administrative exhaustion has not occurred or when a dispute about local taxes arises). Abstention should also

be considered when a state or local authority has adopted a complex administrative proceeding to resolve local disputes involving a governmental entity. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Also see Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 241 (1952) (A declaratory judgment should not be used to "preempt and prejudice issues that are committed for an initial decision to an administrative body. . . ."). Alltel and Nextel also seek abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), which held that a federal court should abstain in cases where there is a parallel state action and the issue in dispute involves an unclear state law.

Comity and "Our Federalism" are the unifying principles in all of these cases cited by Defendants Alltel and Nextel. Those principles have led the Supreme Court to conclude that the United States Constitution contemplates a significant division of power between the states and federal governments; thus, the federal government should respect the right of the states to resolve certain matters locally. Federal interference with state administrative matters, particularly those involving taxes, would violate these principals of comity and "Our Federalism."

All of the cases cited by Alltel and Nextel, however, are distinguishable because Springfield is the plaintiff in this case. This is not a case where a taxpayer is seeking to avoid state procedures by invoking the jurisdiction of the federal court. It is the taxing

authority that is invoking federal jurisdiction. When the taxing authority chooses the federal forum, the reasoning behind the federal abstention cases relied upon by Nextel and Alltel no longer apply. Comity and "Our Federalism" are not offended except in those situations where the federal courts encroach on the autonomy of local authorities. It would be ironic to conclude that a municipality's authority is best respected by denying it access to the federal courts.

Defendants have suggested that *California v. Grace Brethren Church*, 457 U.S. 393 (1982), and *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), are cases where a state or local entity sought and was denied a federal forum, but they are not correct. In *Grace Brethren*, the litigation was initiated originally in two separate suits, one filed by a taxpayer in federal court and one by a taxpayer in state court. *Id.* at 399 n. 8. A federal district court eventually enjoined the State of California from collecting its unemployment taxes and the State successfully appealed to the United States Supreme Court. Because *Grace Brethren* involved an attempt by a taxpayer to enjoin a state, it is not persuasive. In *Franchise Tax*, the State of California was denied access to the federal courts, but that was because neither federal question jurisdiction nor diversity existed. There was simply no statutory basis for subject matter jurisdiction in federal court. In contrast, Springfield's claim is clearly supported by diversity jurisdiction.

Furthermore, any protections to which the state and local authorities are entitled under abstention doctrine are clearly waivable by them. If a state can waive its Eleventh Amendment right by voluntarily suing in federal court, *see Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), it must necessarily follow that a judicially created abstention doctrine can also be waived. It is, therefore, not surprising that the Court has been unable to identify a single case in which a taxing authority has invoked the jurisdiction of the federal court to resolve a tax dispute and the federal court abstained.

Finally, the judicially created abstention doctrines raised by the Defendants have already come under substantial criticism. *See* Robert J. Pushaw, *Bridging the Enforcement Gap in Constitutional Law*, 46 William & Mary L.Rev. 1289 (2004). Article III of the United States Constitution gives Congress the authority to establish the jurisdiction of the lower federal courts, and Congress has said that this Court has jurisdiction because of diversity. *See* 28 U.S.C. 1332. Absent clear precedent, the Court will not reject Congress's directive.

2. Statutory Abstention

In *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), the United States Supreme Court, interpreting the Declaratory Judgment Act, concluded that a court may decline jurisdiction to hear a declaratory judgment action when there is a parallel state court proceeding. Nextel and Alltel argue that *Wilton v. Seven Falls Co.*

requires the Court to decline jurisdiction because there are parallel state court actions which will raise the same issue currently before this Court. *Wilton*, however, does not require anything; it permits a trial court to decline jurisdiction in its discretion. "In the declaratory judgment context, the normal principal that federal court should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Id.* at 288. The Eighth Circuit has referred to the discretion described in *Wilton* as broad. *Scottsdale Insurance Co. v. Detco Industries, Inc.*, 426 F.3d 994 (8th Cir.2005). The sound administration of justice in this case dictates that abstention should not be granted even if there is a parallel state court action. It is apparent that Nextel and Alltel have raised the issue of abstention because they were unsuccessful on the merits of their defense. It would not promote the sound administration of justice to permit a losing party to take advantage of abstention under those circumstances.

In addition, there is no parallel state court action. Springfield's claim against Sprint does not involve Alltel or Nextel, or any of the other Defendants. Alltel's refund suit, which was filed in state court on the same day that Springfield filed its Second Amended Complaint in this case, is not the mirror image of Springfield's declaratory judgment action, as were the two suits in *Wilton*. Furthermore, it does not involve all the Defendants. Indeed, because it is a refund that Alltel seeks in state court, the state court may never reach the issue of whether Springfield's gross receipts tax ordinance

applies to Alltel, given the preliminary hurdles that Alltel must satisfy in a refund case. Therefore, there is no parallel state action that justifies this Court's abstention.

The Eighth Circuit, however, has said that a court might still abstain even when there is not a parallel action. *See Scottsdale Insurance Co. v. Detco Industries, Inc.*, 426 F.3d 994 (8th Cir.2005). In *Scottsdale*, the Eighth Circuit identified six factors for the Court to consider when deciding the abstention issue. Five of those six factors weigh in favor of the Court exercising its jurisdiction in this case.

Springfield's declaratory judgment action will serve a useful purpose because it permits the parties in advance of a costly administrative proceeding to resolve whether Springfield's ordinance applies to Defendants' cell phone services. Resolution of liability permits the parties to wisely invest in an administrative assessment action.

As previously indicated, a refund suit has issues which might preclude the state court from ever reaching the question of whether the tax was owed. Therefore, any overlapping issue might never be reached by the state court in Alltel's state action. That suit is in its infancy and this federal case has been in progress for years. In addition, there is no economy to be gained by abstention because only two defendants out of six have asked the Court to abstain.

Finally, Alltel engaged in procedural fencing when it filed its refund case in state court. Alltel filed its refund case on the same day that Springfield amended its complaint to conform it to the issues actually litigated in this case nearly two years ago. In addition, both Alltel and Nextel failed to raise their abstention arguments when confronted with Springfield's Motion for Partial Summary Judgment early in this litigation. While Alltel and Nextel contend that Springfield's recent addition of a declaratory judgment claim changed the landscape, some of their arguments now raised for abstention were equally applicable to Springfield's Motion for Partial Summary Judgment. Given this record, the Court finds that it was this Court's Order of June 9, 2005, that motivated Alltel and Nextel to seek abstention, not Springfield's recent amendment to conform the pleadings to what had already been litigated.

For all these reasons, the Court has exercised its discretion to hear Counts I and II of Springfield's Second Amended Complaint.

III. Remaining Wireless Defendants

Cingular Wireless LLC, and Southwestern Bell Wireless LLC, did not join in Alltel and Nextel's Motion to Dismiss. Nor have they accepted the Court's invitation to file their own motion to dismiss Springfield's tax collection claim. Nonetheless, the Court dismisses Count I of Springfield's Complaint as to Cingular Wireless LLC and Southwestern Bell Wireless LLC.

Appendix C

Missouri's exclusive tax remedy doctrine precludes this Court from granting relief on Springfield's tax collection claim against these Defendants. A district court has the inherent power to dismiss a complaint *sua sponte* under Rule 12(b)(6) as long as the dismissal does not precede service of process. *Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir.1991); *Mildfelt v. Circuit Court*, 827 F.2d 343, 345 (8th Cir.1987) (per curiam) ("A district court has the power to sua sponte dismiss a complaint for failure to state a claim."); *see also* 5A C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 301 (2d ed.1990). Because of Missouri's exclusive tax remedy doctrine, Springfield's tax collection claim against Cingular Wireless LLC and Southwestern Bell Wireless LLC fails to state a claim on which relief can be granted. The Court, therefore, dismisses without prejudice Springfield's tax collection claims as to Defendants Alltel Communications, Inc.; Cingular Wireless LLC; Southwestern Bell Wireless LLC; and Nextel West Corporation, so that such claims may be pursued administratively.

IV. Conclusion

Count I of Springfield's Complaint is dismissed without prejudice for failure to state a claim. The dismissal applies to Alltel Communications, Inc.; Cingular Wireless LLC; Southwestern Bell Wireless LLC; and Nextel West Corporation. In all other respects, Alltel and Nextel's Motions to Dismiss are DENIED.

IT IS SO ORDERED.

Appendix C

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: July 3, 2007
Jefferson City, Missouri

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION DENYING MOTION TO VACATE OR RECONSIDER DATED DECEMBER 20, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

Case No. 04-4099-CV-C-NKL

CITY OF JEFFERSON, et al.,

Plaintiffs,

v.

CINGULAR WIRELESS, LLC, et al.,

Defendants.

ORDER

On October 17, 2006, the Court dismissed all remaining claims against Defendant Alltel Communications, Inc. ("Alltel"), because Missouri case law precludes the Court from granting further relief to Plaintiff City of Springfield ("Springfield"). Springfield now moves the Court to Clarify, or in the Alternative, to Reconsider the October 17, 2006 Order [Doc. # 408]. Alltel also moves for Reconsideration and/or Clarification of that Order [Doc. # 412] and for vacatur of the Court's June 9, 2005 Partial Summary Judgment Order [Doc. # 221]. Also pending is Springfield's Motion to Lift the November 10, 2004 Protective Order in Part [Doc. # 409].

Appendix D

Having considered the October 17, 2006 Order granting Alltel's Motion to Dismiss, as well as the June 9, 2005 Order granting Springfield's Motion for Partial Summary Judgment, the Court declines to vacate or amend either Order for the reasons set forth below. The Court, however, will grant Springfield's Motion to Modify or Lift the Protective Order [Doc. # 409]. The Protective Order is amended to permit data obtained during this litigation to be used in any subsequent proceeding to assess or collect the tax which is the subject of this litigation. In no way is this Order intended to limit the ability of another court or administrative hearing officer to enter a different protective order concerning this material.

I. Defendant Alltel's Motion for Reconsideration [Doc. # 407]

This is not a complicated case, although the docket sheet suggests otherwise.

The Court has made two substantive rulings. First, on June 9, 2005, the Court granted Springfield's Partial Motion for Summary Judgment. The Court ruled that each of the Defendants[1] is liable to pay taxes under

1. The Court has made no ruling on the liability of SBC Communications, Inc. ("SBC"). SBC was not the subject of Springfield's Motion for Partial Summary Judgment. Only Defendants Southwestern Bell Wireless, LLC, Nextel West Corp., Alltel Communications, Inc., and Cingular Wireless LLC were the subject of and defended against Springfield's Motion for Partial Summary Judgment. In this Order, they are referred to as the "Defendants."

Springfield's gross receipts ordinance. The Court found that the term "telephone" as used in Springfield's gross receipts ordinance applies to the Defendants' Commercial Mobile Radio services. It also held that the uncontroverted facts show that each Defendant furnished some telephone services within the City of Springfield and obtained revenue as a result. Therefore, Alltel and the other Defendants owe Springfield some amount of gross revenue tax for the relevant time period.

The Court made its ruling after considering all arguments raised by the parties, including the Defendants' arguments in support of their counterclaims and defenses. The Court specifically rejected the Defendants' argument that Springfield's taxing ordinance did not comply with the Hancock Amendment and violated the Mobile Telecommunications Sourcing Act. It ruled that Springfield's gross receipts tax is not a disguised sales tax even though it is levied in part on sales made to Defendants' customers. It found that Springfield was not required to comply with the Missouri tax collection statutes. Finally, it concluded that Missouri law would permit Springfield to resolve purely legal issues in a court proceeding prior to commencement of an administrative collection process, even though it is a taxing authority and not a taxpayer. In its Order, the Court said that it was not deciding the question of whether Springfield had the right to litigate before this Court the amount of taxes owed. That issue was not raised by Springfield's Motion for Partial Summary Judgment. Each of the issues ruled by the Court in its June 9, 2006 Order were legal issues.

Appendix D

The second substantive Order was entered by the Court on October 17, 2006. In that Order, the Court reiterated its belief that Missouri courts would permit Springfield to resolve purely legal questions concerning liability before requiring either the taxing authority or the taxpayer to incur the expense of a complicated, factual based administrative process. However, Missouri law would not permit the Plaintiffs to bypass its administrative assessment procedures. Assessment involves factual issues and the administrative hearing officer is best able to resolve those fact issues and apply its ordinance to those facts. As a result, the exclusive tax remedy doctrine required the Court to dismiss Springfield's remaining claims without prejudice.

The Court has recited this information to make clear that these are the only substantive rulings made by the Court. It has made no ruling on the amount of taxes owed or what the parties can do if they are dissatisfied with the administrative process. Any statements made by the Court that could be construed otherwise should not be so construed.

In addition to seeking clarification, Defendant Alltel requests the Court to vacate its June 9, 2005 Order finding Alltel liable to Springfield for unpaid gross receipts taxes. Although its argument is lengthy, the premise of the argument is not complicated. Alltel claims that the Court never had subject matter jurisdiction in this case because 1) the controversy between Alltel and Springfield is not ripe; 2) the June 9 Order is advisory; 3) the Court had no authority under the Federal

Declaratory Judgment Act or the Missouri Declaratory Judgment Act to issue its opinion;[2] and 4) Missouri's exclusive tax remedy doctrine does not permit a taxing authority to resolve legal issues in a court prior to the assessment process. In addition, it argues that the Court should have abstained from resolving any aspect of Springfield's lawsuit against Alltel.

The Court has previously addressed most of these issues. There is clearly a case or controversy before the Court. Alltel won't pay gross receipts taxes to Springfield for its "Commercial Mobile Radio" services. Alltel even refused to file the data needed by Springfield to make an assessment. Alltel claims that it doesn't have to do so because Springfield's gross receipts ordinance does not apply to "Commercial Mobile Radio" services. In its Motion for Partial Summary Judgment, Springfield asked the Court to rule that its ordinance did apply to "Commercial Mobile Radio" services. In its

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2. While the original pleading in this matter did not separately request a declaratory judgment on the issue of liability, the record shows that this issue was raised by Springfield in its Motion for Partial Summary Judgment and joined by the Defendants in their Opposition to Springfield's Motion for Partial Summary Judgment and their own counterclaims. Therefore, pursuant to Federal Rule of Civil Procedure 15, the Court has treated Plaintiff's Motion for Partial Summary Judgment as a request for a declaration of law on Defendants' liability under Springfield's gross receipts tax. Rule 15(b) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

counterclaim, Alltel asked for a ruling that the ordinance did not apply. If this is not a ripe case or controversy, then neither is a declaratory judgment action to interpret an insurance contract to resolve coverage issues, something routinely done in federal courts based on diversity jurisdiction.

Alltel would be correct about the ripeness issue if it is also correct that Missouri law does not permit a municipality to resolve tax coverage issues when the taxpayer refuses to pay or comply with city ordinances. No matter how you slice, dice or dress the question, all the issues raised by Alltel in its Motion for Reconsideration are dependent on whether Missouri law permits Springfield to get a legal ruling from a court that its gross receipts tax must be paid by Alltel. The Court believes that Missouri would permit Springfield to do so. Missouri courts have permitted taxpayers to do so and there is no reason to think that the same opportunity would not be extended to the taxing authority, both for reasons of symmetry and the practical reasons that have been relied on in other jurisdictions which held that the exclusive tax remedy doctrine does not preclude early court resolution of purely legal issues.

The Missouri cases relied on by the Defendants did not address this specific question so cannot fairly demonstrate that Missouri courts today would not permit taxing authorities the same economy of action that a taxpayer has under Missouri law. Also, in *Premium Standard Farms, Inc. v. Lincoln Township*

of Putnam Co., the Missouri Supreme Court specifically held that administrative exhaustion is excused when "the authority of the political subdivision to impose particular regulations is challenged...." 946 S.W.2d 234, 237 (Mo. en banc 1997). That case was filed by the taxpayer, not the taxing authority, but the Court believes that the Supreme Court's language is broad enough to comfortably predict that Missouri courts would permit Springfield to get a resolution of its own authority to impose a tax before exhausting its administrative process to determine the amount of taxes owed.

As to the claim that the Court is just issuing an advisory opinion, the Court thinks that Defendants would not be so adamant if the Court's opinion were merely advisory. The Court has ruled that Alltel is liable under its gross receipts ordinances to the City of Springfield to pay gross receipts taxes. The Court's June 9, 2005 Order and its Order on October 17, 2006, are not advisory. *E.g.*, *City of St. Louis v. United Railways Co. of St. Louis*, 174 S.W. 78 (Mo.1914).

Alltel also claims that the Court's Order of June 9 granting declaratory relief is not authorized by the federal Declaratory Judgment Act, 28 U.S.C. § 2201, nor the Missouri State Declaratory Judgment Act, Mo. Rev. Stat., § 527.010. As for the latter, the authority of the Court to grant a declaratory judgment appears to be a matter of procedure, not substance. If so, the federal Declaratory Judgment Act controls, not the Missouri State Declaratory Judgment Act. *See Tompkins v. Erie R.R. Co.*, 305 U.S. 673 (1938).

However, under either, if Springfield has the authority to pursue the legal issue of liability in court before implementing its administrative procedures to assess taxes, then a federal court has jurisdiction to make that legal determination. The diversity statute gives authority to the federal court to interpret the city's code and determine liability just as the diversity statute permits a federal court to interpret an insurance contract under state law, or to decide the meaning of a state statute or constitutional provision. *E.g.*, *City of St. Louis v. United Railways Co. of St. Louis*, 174 S.W. 78 (Mo.1914).

As for Alltel's request that the Court should abstain voluntarily from deciding Alltel's liability, too much work has been invested by all parties and the Court to warrant dismissing on abstention grounds. The Defendants, including Alltel, did not ask the Court to abstain at an early stage in this litigation. In fact, Alltel filed a counterclaim against the Plaintiffs seeking a declaratory judgment that the Springfield statute was unenforceable because of the Hancock Amendment. In addition, its opposition to Plaintiffs' Motion for Partial Summary Judgment did not raise the issue of abstention. It was not until the Court ruled against Alltel that it raised the issue of abstention. It would violate all principles of fairness and judicial economy to dismiss on abstention grounds at the twilight of this litigation. If Alltel had wanted resolution of the issue in a state court, it could have filed a declaratory judgment action there long ago.

Appendix D

II. Springfield's Motion to Clarify or in the Alternative to Reconsider [Doc. # 408]

As the Court has already said, its October 17 Order was intended to accomplish two things only. The Court has now clarified for both parties the issues which have been decided by the Court. The Court will not address the question of what may happen if Alltel refuses to pay after the administrative process is completed, including appeal under Mo. Rev. Stat., Chapter 536. Nothing in its Order should be construed as a ruling on this issue.

III. Plaintiffs' Motion to Modify or Lift the Protective Order for Limited Purposes [Doc. 409]

The Court grants the Plaintiffs' request to lift the Protective Order. The Protective Order is amended to permit data obtained during this litigation to be used in any subsequent proceeding to assess or collect the tax which is the subject of this litigation. Nothing in this Order should be interpreted to suggest that another court cannot alter the Protective Order in any way that it sees fit. Because the Protective Order will be applicable to further proceedings absent modification by another court or the parties, there is no reason for Alltel's concern that confidential matters will not be adequately protected in collateral administrative and state court proceedings.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: December 20, 2006
Jefferson City, Missouri

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION DISMISSING TAX COLLECTION CLAIM DATED OCTOBER 17, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

Case No. 04-4099-CV-C-NKL

CITY OF JEFFERSON, et al.,

Plaintiffs,

v.

CINGULAR WIRELESS, LLC, et al.,

Defendants.

ORDER

The City of Springfield ("the City") levies a gross receipts tax on all "telecommunications and telephonic services" supplied "within the city." *See* Springfield Municipal Ordinance § 70-452. Because Defendant Alltel Communications, Inc. ("Alltel"), took the position that commercial mobile radio ("CMR")[1] services were not "telecommunications and telephonic services" within the

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1. Commercial mobile radios are commonly referred to as cell phones, both by lay people and the telecommunications industry. That is the term the Court will use.

meaning of the City ordinance, Alltel has never paid gross receipts tax on cell phone revenue generated within the City.

On April 14, 2004, Counsel for the City sent a demand letter to Alltel's Chief Financial Officer requesting payment for five years' worth of gross receipts taxes. Plf. Sugg. Opp. Exh. A. The letter further stated that if payment was not received by April 29, 2004, the City would "proceed with all legal remedies." *Id.* When Alltel did not comply, the City filed the present lawsuit on May 12, 2004, to collect the taxes due. The City then filed a Motion for Summary Judgment to determine whether Alltel was liable to pay gross receipts taxes for revenue generated by the sale of cell phone services to Springfield residents. In an Order issued on June 9, 2005, the Court found that cell phones are "telecommunications and telephonic services," within the meaning of the Springfield gross receipts ordinance. In that Order, however, the Court reserved judgment on the question of whether the Plaintiffs could recover past due taxes without following its administrative procedures.

After the Court entered its Order, the Missouri General Assembly passed HB 209 which required the Plaintiff to dismiss its lawsuit against Alltel and the other Defendants. Plaintiff then sought a ruling in state court to determine the constitutionality of HB 209 and this action was stayed. After the Missouri Supreme court

struck down HB 209 as unconstitutional,[2] the stay of this case was lifted.

Alltel now moves to dismiss the case[3] for lack of subject matter jurisdiction because, according to Alltel, the City's only remedy is to collect taxes from Alltel through the City's administrative procedures. In the alternative, Alltel asks the Court to abstain from resolving the case in the interest of federalism [Doc. # 353]. For the reasons set forth below, the Court finds that the remaining claims in the case should be dismissed because Springfield's ordinances and Missouri law do not give the City a common law cause of action for tax collection.[4]

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2. *See, City of Springfield v. Sprint Spectrum, L.P.*, 2006 WL 2257073 (August 8, 2006).

3. To date, none of the other Defendants has joined in Alltel's Motion. Because a failure to state a claim defense can be raised at any time, the other Defendants may seek dismissal for the reasons discussed in this order. The Court clarifies this issue because of prior scheduling orders entered by the Court.

4. Contrary to Alltel's assertions, the Court has subject matter jurisdiction. Diversity jurisdiction is established by federal law and is present in this case. Furthermore, the modern trend in state courts is to recognize that a court has subject matter jurisdiction in a case involving the exclusive tax remedy doctrine, but there is no cause of action to collect past due taxes in court. In other words, any dismissal is for failure to state a claim and not for lack of subject matter jurisdiction. *See, Dubai Petroleum Co. v. Kazi*, 12 S.W.2d 71, 76-77 (Tex.2000).

Appendix E

I. The "Exclusive Tax Remedy Doctrine"

In *State ex rel. Hayes v. Snyder*, 139 Mo. 549, 552 (Mo.1897), Jackson County Collector Hayes sued the previous owners of a parcel of real estate to collect a personal judgment against them for taxes assessed against the property while they had owned it. The Missouri Supreme Court held that the state's exclusive remedy was to impose a lien on the property for which back taxes were due. *Id.* at 554-55. In reaching this conclusion, the state supreme court reasoned that

> A tax is not a debt in the ordinary sense of that term, as it is not founded upon contract, and as a general thing a debt can not be created in any other way. Tax proceedings are *in invitum.* The tax is an impost levied by the authority of the government for the support of the State, and has none of the characteristics of a contract, the essence of which is an agreement expressed or implied. Therefore, if the statutes of this State make special provisions for the collection of taxes against real estate, and do not apparently contemplate that any others will be necessary, the mode of collection prescribed by statute is exclusive.
>
> [W]hen the statute undertakes to provide remedies, and those given do not embrace an action at law, a common law action for the recovery of the tax as a debt will not lie. This

> is the generally accepted doctrine, though there are exceptions to this general rule, for instance, where right to bring suit is expressly given by statute, or where the implication of an intent to give a remedy by suit may be so strong as to be conclusive; as where the statute provides for tax, but is silent as to the method of collection.

Id. at 553-554 (internal quotations omitted).

In *Kansas City v. Field*, the Missouri Supreme Court again held that "a statutory remedy for the collection of a tax or a special assessment, whether it be by distress or by action, is an exclusive remedy." 285 Mo. 253, 274 (Mo.1920). *Accord City of St. Louis v. United Rys. Co.*, 174 S.W. 78 (Mo.1914) (where an ordinance provides a method for enforcing a tax, it will be held to be exclusive); *State ex rel. Steed v. Nolte*, 138 S.W.2d 1016 (Mo.1940) (en banc) (holding that for tax collection purposes, the city must use the collection procedures set forth in applicable law)

Although these Missouri cases are old, the City has offered no authority to suggest that Missouri no longer recognizes the exclusive remedy doctrine articulated in *Hayes*.

Appendix E

II. Exceptions to the Exclusive Remedy Doctrine

Other jurisdictions which recognize the exclusive tax remedy doctrine have permitted court actions under limited circumstances. When there is a question of statutory interpretation as distinct from a question of statutory applicability, these jurisdictions will permit court action to resolve purely legal questions. *See* M.L. Cross, Annotation, *Tax Questions as Proper Subject of Action for Declaratory Judgment*, 11 A.L.R.2d 359 (Supp.2005). While the Court has been unable to locate a Missouri case on this specific issue, Missouri courts do permit purely legal issues to be resolved in court even when administrative remedies have not been exhausted. The practical considerations discussed in those cases, *eg.*, *Premium Std. Farms v. Lincoln TP of Putnam County*, 946 S.W.2d 234 (Mo.1997), are equally applicable where there is a legal dispute about whether a tax is owed. Therefore, it is predicable that Missouri courts will find that a declaration of law is permissible, even if there is an exclusive administrative remedy for the actual collection of the taxes.

III. Discussion

The Springfield ordinances give the City a specific remedy for past due gross receipts taxes. They provide that:

> Every person required to pay the license tax levied by this article shall cause to be filed with the director of finance on January 15, April

> 15, July 15 and October 15 of each year a true statement, under oath, of the gross receipts of such business for the three calendar months preceding the filing of such statement. The director of finance and his authorized agents may investigate the correctness and accuracy of such quarterly statements, and for that purpose shall have access at all reasonable times to the books, documents, papers and records of the licensee.

Id. § 70-454. If a person refuses to pay any tax, the Director may estimate the delinquent taxes and make an assessment based on that estimate. *Id.* § 70-154. After the Director notifies the tax payer of the assessment plus penalties including interest, the taxpayer has ten days to request a hearing to contest the assessment. *Id.* § 70-152.

In the event a hearing is requested, "[t]he director, employee of the city, or hearing officer appointed by the city manager shall hear the case and make a determination in accordance with the provisions of RSMo ch. 536." *Id.* at § 70-155. "Such hearing need not be conducted according to the rules of evidence." *Id.* The director is empowered to subpoena witnesses or to issue subpoenas duces tecum for any book, paper, record or memorandum. *Id.* "The decision of the hearing officer . . . shall be in writing and shall be subject to appeal under RSMo ch. 536." *Id.* § 70-156. If the delinquent taxpayer fails to pay the assessment after the decision becomes final,

> the license of such person shall be revoked without further hearing five days after the director mails such person a notice that the license has been revoked, unless the person pays the city the delinquent assessment, including penalties and interest to date, which money shall be held for possible refund by the director while the decision is on appeal. Revocation of such license pursuant to the provisions of this section is not appealable, and such license may only be reinstated by the person paying to the director the money due on the assessment, including all penalties and interest to date.

Id. § 70-157.

Reading together all portions of Springfield Municipal Code chapter 70, the Court concludes that the Code contemplates a complete remedial scheme for the collection of delinquent gross receipts tax. Enforcing the ordinance is the responsibility of the City's Director of Finance. All licensees must file quarterly gross receipts reports with the City, which the Director is authorized to investigate and verify. If the licensee refuses to do so, the director may issue subpoenas and demand to inspect records under penalty of revocation of the license. If the Director determines that a licensee had failed to pay its tax obligation, she "shall notify such person of this determination, which determination shall be an assessment of the license fee or tax which is due and owing, plus all penalties including interest."

Id. § 70-152. That assessment becomes final ten days after it is delivered to the licensee unless the licensee requests a hearing. If a hearing is requested, the Director or a hearing officer "shall hear the case and make a determination in accordance with the provisions of RSMo ch. 536." *Id.* at § 70-155. That determination becomes final after 30 days and may be appealed under Mo. Rev. Stat. ch 536. However, if the licensee fails to pay after the final determination, its license "shall be revoked without further hearing . . . unless [and until] the person pays the city the delinquent assessment." *Id.* § 70-157.

The Code makes no provision for the collection of the delinquent tax through an original legal action in a court. Instead, it gives Springfield a specific administrative remedy. This indicates that the ordinance does not contemplate additional remedies for tax collection.

Furthermore, Springfield's tax collection remedy is adequate. While Alltel has refused to file the reports needed to make an assessment, the City has the power to make an estimate based on the information available to it. The record shows that Alltel has reported gross receipts revenue collected from customers having a "principal place of use" within the city. While this may not include all revenue subject to gross receipts tax, the City has the power to estimate the actual tax due. If Alltel contests the tax, the City can subpoena all of Alltel's records. Pending appeal, the City can force Alltel to pay the taxes "in escrow" or require Alltel to stop

doing business in the City. While this may be a difficult political choice, Springfield clearly has an adequate remedy to collect delinquent taxes.

IV. Conclusion

When the Court first considered the *Hayes* and *Premium Standard Farms* line of cases in its June 9, 2005 Order [Doc. # 221], it was faced with the issue of whether cell phone services were the same as telephonic and telecommunications services. That was a purely legal issue. The issue was raised in a motion for summary judgment and the Court had the authority to declare the law on this limited legal issue. Indeed, it would make no sense to require the parties to go through an expensive assessment process only to learn on appeal that the tax payer did not owe the tax. As previously discussed, declarations of law are exceptions to the exclusive tax remedy doctrine. *See* M.L. Cross, Annotation, *Tax Questions as Proper Subject of Action for Declaratory Judgment*, 11 A.L.R.2d 359 (Supp.2005).

By contrast, the only issue remaining at this point in the litigation is which of the calls billed to Defendants' customers were made "within the city." Since there is no dispute that at least some set of calls would fit any definition of that phrase, there is no question that Alltel owes some amount of gross receipts tax. For example, when a customer buys a calling plan that provides unlimited calling for a certain number of minutes each month, the customer pays for the right to make calls even if no call is ever placed. If this right to make calls

is purchased in Springfield, then revenue has been generated there. On the other hand, if a customer is being charged only for calls actually made, there may be a dispute about whether those calls were made "within the city".

Thus, the only issues remaining in this case deal with the amount of tax owed, and there is no reason why the city's administrative procedures are inadequate for resolution of that determination. Because there are no outstanding claims upon which relief can be granted in this forum, the Court dismisses Springfield's remaining claims without prejudice so that it can pursue its administrative remedy.

Accordingly, as set forth in this opinion, Springfield's remaining claims are dismissed without prejudice.

IT IS SO ORDERED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: October 17, 2006
Jefferson City, Missouri

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION ABSTAINING FROM RULING ON THE CONSTITUTIONALITY OF HB 209 DATED SEPTEMBER 23, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Case No. 04-4099-CV-C-NKL

CITY OF JEFFERSON and
CITY OF SPRINGFIELD,

Plaintiffs,

v.

CINGULAR WIRELESS, L.L.C., et al.,

Defendants.

ORDER

Pending before the Court is Plaintiffs' Motion for Summary Judgment [Doc. # 250] asking the Court to declare House Bill 209 ("HB 209")[1] unconstitutional. Also

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1. Missouri House Bill 209, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005). HB 209 became effective on August 28, 2005, and its relevant provisions are now codified at Mo. Rev. Stat. §§ 92.074 to 92.098. During the course of this case, the parties and the Court have referred to the statutes as HB 209 rather than their codified citations.

pending before the Court are three Motions filed by Defendants asking the Court to abstain from ruling on the constitutionality of HB 209 and to stay the proceedings in this case while the constitutionality of HB 209 is resolved in state court.[2] Also pending are several motions for summary judgment filed by Defendants to enforce the provisions in HB 209.[3] Based on Supreme Court precedent, the Court will abstain from ruling on the constitutionality of HB 209. The Court will also stay Springfield's case against the Defendants because a lower Missouri court has ruled that HB 209 is constitutional. Because the Court has abstained on the constitutionality of HB 209, it will deny without prejudice Defendants' Motions which seek to enforce HB 209.

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2. Specifically, the Motions are (1) SBC Communications, Inc. and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri (collectively "SBC Defendants") Joint Motion to Stay Based on Abstention [Doc. # 256]; (2) the Motion to Stay filed by Nextel West Corp., Cingular Wireless L.L.C., New Cingular Wireless PCS, L.L.C. f/k/a Southwestern Bell Mobile Systems, L.L.C., and Alltel Corporation ("collectively CMRS Defendants") [Doc. # 259]; and (3) Sprint Corporation's ("Sprint") Joinder in SBC Defendants' Motion to Stay [Doc. # 261].

3. Dispositive motions based on HB 209 were filed by: (1) Cingular Wireless, L.L.C., and New Cingular Wireless PCS, L.L.C., f/k/a Southwestern Bell Mobile Systems, L.L.C. [Doc. # 239]; (2) Alltel Communications, Inc. [Doc. # 241]; (3) Nextel West Corp. [Doc. # 244]; and (4) SBC Defendants [Doc. # 247]. Although it is not technically a dispositive motion, also included is Sprint Corporation's ("Sprint") Motion to Vacate the Court's Grant of Summary Judgment Based on HB 209 [Doc. # 242]. Plaintiffs' dispositive motion wherein they challenge the constitutionality of HB 209 is at Doc. # 250.

Defendants may refile these Motions if HB 209 is ultimately found, after appeal, to be constitutional. Plaintiffs' motions, which ask the Court to declare HB 209 unconstitutional, will also be denied because the Court is deferring to the state courts on this issue.

I. Background

A. HB 209

Plaintiffs filed their Complaint against Defendants in May 2004 alleging that Defendants failed to pay gross receipt taxes on the mobile telephone component of the telecommunications business which they operate in each municipality. Plaintiffs filed for partial summary judgment on the issue of liability. [Doc. # 95.] After briefing and oral argument, the Court granted Plaintiffs' Motion against all Defendants, except the SBC Defendants. [Doc. # 221.][4]

Subsequently, the Missouri Legislature passed and Governor Matt Blunt signed HB 209. HB 209 prospectively changes the manner in which municipalities can tax mobile telephone business and also requires some municipalities to dismiss all pending litigation filed by the municipalities to recover taxes

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4. The summary judgment motions which related to the liability of SBC Defendants were not filed at the time the Court found the remaining Defendants were required to pay the disputed gross receipt taxes.

which the mobile telephone companies owed as a result of prior state and municipal tax laws.[5]

After HB 209 was passed, Defendants filed motions seeking to dismiss Springfield's claims based on HB 209. Subsequently, both the City of Jefferson and Springfield, filed motions for summary judgment asking the Court to declare HB 209 unconstitutional. Both Plaintiffs challenge HB 209 in its entirety under eight separate sections of the Missouri Constitution, but Plaintiffs do not challenge HB 209 under any provision of the United States Constitution.

B. Sprint's Challenge Based on HB 209

When the Court entered its Order granting judgment in favor of Plaintiffs on the issue of liability, the Court also granted summary judgment in favor of Springfield on Sprint's Counterclaim. *See* [Doc. # 221] at p. 16. Unlike the other Defendants, Sprint did not move for summary judgment based on HB 209. Instead, Sprint filed a Motion to Vacate wherein it requests that the Court vacate its grant of summary judgment in favor of Plaintiff Springfield on Sprint's Counterclaim because the provisions contained in HB 209 require Springfield to dismiss its pending case. [Doc. # 242.]

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5. The retroactive dismissal portion of HB 209 is in Mo. Rev. Stat. § 92.089. Plaintiff City of Jefferson ("Jefferson City") is exempted from the dismissal provisions of HB 209, but it is still subject to the prospective conditions contained therein.

C. Missouri Proceedings

There are presently cases pending in the Missouri courts that will inevitably address the issue of the constitutionality of HB 209. Springfield is currently engaged in ongoing litigation in the Circuit Court of Greene County, Missouri, against Sprint Spectrum. In *City of Springfield v. Sprint Spectrum, L.P.*, No. 104CC5647 (Circuit Court of Greene County, Missouri), the issue of the constitutionality of HB 209 has been raised. Numerous other cities are litigating similar issues as those presented herein in a putative class action in the Circuit Court of St. Louis County. That matter is styled as *City of University City, Missouri, et al. v. AT&T Wireless Services, Inc., et al.*, No. 01CC4454 (Circuit Court of St. Louis County, Missouri). The Honorable Judge Drumm entered an order in this case on September 16, 2005, declaring HB 209 constitutional.

II. Discussion

A. Abstention

Supreme Court precedent clearly requires this Court to abstain from deciding a dispute which involves unsettled state law that implicates the relationship between the state and a municipality. The Supreme Court has stated,

> [W]here the [state law] issue touched upon the relationship of City to State . . . or involved

> the scope of a previously uninterpreted state statute which, if applicable, was of questionable constitutionality . . . we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959) (citing *City of Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168 (1942); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229 (1957)).

In *Fieldcrest Dairies*, the Court was faced with a conflict between a Chicago ordinance and an Illinois statute. In declining to resolve the conflict, the Court noted that it inherently involved the relationship between the state and a municipality and stated,

> Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act. The determination which the District Court, the Circuit Court of Appeals or we might make could not be anything more than a forecast - a prediction as to the ultimate decision of the Supreme Court of Illinois . . . [Abstention] will avoid the waste of a tentative decision and any needless friction with state policies.

Fieldcrest Dairies, 316 U.S. at 171-72 (quotation omitted). Such an approach is appropriate where the underlying state issue is unsettled. *See City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959) (overturning lower courts' decisions interpreting unsettled state law that involved state constitutional questions and directing the lower court to abstain).

Plaintiffs argue that the validity of HB 209 is not "unsettled" because it is patently unconstitutional. Therefore, according to Plaintiffs, the constitutionality of HB 209 is not in question and it is not necessary for this Court to abstain from ruling on the issue. In support of their argument, Plaintiffs cite *Wisconsin v. Constantineau*, in which the Supreme Court held that a federal court does not need to abstain from determining the validity of a state statute under the United States Constitution where the state statute is unambiguous. 400 U.S. 433 (1971). Plaintiffs in the instant case, however, present no federal constitutional question—all of their challenges to HB 209 arise under the Missouri Constitution and *Constantineau* is therefore inapplicable.

Moreover, the Court cannot say that the constitutional status of HB 209 is "settled" law. The question raised by HB 209 is whether the State can retroactively confiscate the property of its municipalities—*e.g.*, the back taxes that are owed to Plaintiffs—and give that property to private

corporations.[6] At least one Missouri state court has found this to be permissible. While the issue will ultimately be resolved by appellate courts, this Court cannot say that the statute is so patently unconstitutional that the status of HB 209 is settled law.

Plaintiffs also implore the Court to discount the clear holding of *Thibodaux* because of its age and because of the Supreme Court's ruling in *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959), which was decided on the same day as *Thibodaux*. First, the age of *Thibodaux* is not relevant and it is undisputedly controlling law for this Court. This is particularly true where *Thibodaux* continues to be cited by the Supreme Court as guiding precedent. In *Colorado River Water Conservation Dist. v. United States*—a primary case relied on by Plaintiffs—the Supreme Court positively cited *Thibodaux* for the proposition that "[a]bstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." 424 U.S. 800, 814 (1976). Thus, there is no indication that *Thibodaux* has been abandoned by the Supreme Court.

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6. Even if this Court had not already resolved Defendants' liability for the past due taxes at the time this legislation was adopted and signed into law by the Governor, the Plaintiffs had an inchoate property right to any past due taxes authorized by then existing law and HB 209 effectively takes away that property right.

Moreover, *Allegheny County* does not require that this Court ignore *Thibodaux*. In *Thibodaux*, Justice Stewart's concurring opinion clearly drew a distinction between the two cases when he wrote:

> This case is totally unlike [*Allegheny County*], except for the coincidence that both cases involve eminent domain proceedings. In [*Allegheny County*] the Court holds that it was error for the District Court to dismiss the Complaint. The Court further holds in that case that, since the controlling state law is clear and only factual issues need be resolved, there is no occasion in the interest of justice to refrain from prompt adjudication.

360 U.S. at 31 (Stewart, J. concurring). Defendants are not requesting that this Court dismiss Plaintiffs' Complaint nor is the state law that is the subject of the parties' dispute "clear." Therefore, *Allegheny County* is distinguishable from *Thibodaux*.

Based on clear Supreme Court precedent, this Court will refrain from determining the constitutionality of HB 209. The ongoing proceedings that are currently pending in the Missouri courts appear to be sufficient venues to present these issues for final adjudication.

B. Stay

Because the Court will abstain from ruling on the constitutionality of HB 209, it will also stay consideration of Defendants' dispositive motions which relate to the enforcement of HB 209. The Court will also stay the remaining issues in Springfield's case against the Defendants.

III. Conclusion

Accordingly, it is hereby ORDERED that Defendants' Motion to Stay Based on Abstention [Docs. 256, 259, 261] are GRANTED as follows:

(1) The Court will abstain from ruling on the constitutionality of HB 209.

(2) The Court will stay Springfield's case against the Defendants.

It is further

ORDERED that Plaintiffs' Motion for Summary Judgment [Doc. # 250], in which Plaintiffs seek a ruling that HB 209 is unconstitutional, is DENIED. The Court has abstained in favor of the state courts on this issue. It is further

Appendix F

ORDERED that Defendants' pending Motions for Summary Judgment based on HB 209 [Docs. 239, 241, 242, 244 and 247] are DENIED without prejudice.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

DATE: September 23, 2005
Jefferson City, Missouri

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION GRANTING PARTIAL SUMMARY JUDGMENT DATED JUNE 9, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

Case No. 04-4099-CV-C-NKL

CITY OF JEFFERSON and
CITY OF SPRINGFIELD,

Plaintiffs,

v.

CINGULAR WIRELESS, LLC, et al.,

Defendants.

ORDER

This case raises the question of whether the Plaintiffs can collect gross receipt taxes from the Defendants for the mobile telephone component of their businesses. The Court concludes that the Plaintiffs' gross receipt tax ordinances are enforceable and that they apply to mobile telephone services just as they apply to land line telephone services. Accordingly, the Court will grant the Plaintiffs' Motion for Partial

Appendix G

Summary Judgment (Doc. 95) and Plaintiff Springfield's Motion for Summary Judgment on Sprint's Counterclaim (Doc. 157).

I. Background

Plaintiffs Jefferson City and Springfield (collectively "Cities") are Missouri constitutional charter cities. Springfield's charter, which was adopted in 1953, sets forth a specific list of business categories that are subject to taxation. That list includes "telephone companies." Springfield City Charter, art. XVIII § 18.1(3) (Def.Ex. 15, p. 116). Jefferson City's charter, which was adopted in 1986, is less specific-it provides for the taxation of all businesses that Missouri law allows to be taxed by "constitutional charter cities, cities of the first, second, third or fourth class, or cities of any population group." Jefferson City Charter, art. XI § 11.1(a) (Def.Ex. 26, p. 26). Because it is undisputed that Missouri law allows municipalities to tax telephone companies, Jefferson City, by incorporation, has included telephone companies in its list of businesses subject to taxation.

Pursuant to their respective charters, each plaintiff has enacted a gross receipts ordinance which imposes a tax on telephone services. Springfield's ordinance, as originally enacted in 1968, provided as follows:

> Every person engaged in the business of supplying telephone and telephonic service within the City shall pay as a license tax a sum equal to 6% of the gross receipts from such business.

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Springfield Code § 20-22 (January 2, 1968) (Def.Ex. 32). In 2000, the ordinance was amended to provide as follows:

> Every person engaged in the business of supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city shall pay as a license tax a sum equal to six (6) percent of the gross receipts from such business.

Springfield Code § 70-452 (2000) (recodified June 2, 2003) (Def.Ex. 5).

Jefferson City's ordinance as amended in 1980 provides as follows:

> Every person, firm or corporation engaged in the business of . . . furnishing telephone service, telecommunication services for residential, commercial, business, manufacturing, industrial, or for any other purposes in the City of Jefferson, who shall furnish the services within the City, shall pay to the City a tax equal to seven (7%) per cent of the gross receipts solely derived from . . . charges for local telephone or telecommunication services in said City as a license tax for conducting such business within the City.

Jefferson City Ordinance No. 9485 (1980) (Def.Ex. 22).

Appendix G

Defendants are telecommunication companies which provide a variety of services, including mobile telephone services. For the purposes of this case, however, the Defendants prefer to use the term "Commercial Mobile Radio Service" ("CMRS") to describe the mobile telephone services which they sell.[1]

Whatever name one chooses to call the Defendants' services, it is clear that the Defendants earn money by providing "Commercial Mobile Radio Services" in Springfield or Jefferson City. Defendant Nextel admits that it provides CMRS in Jefferson City and Springfield. (Def. Response to Pl. Statement of Facts [Doc. 146] ¶ 22.) Defendant Alltel's website indicates that the company provides coverage in the Springfield area. (Pl.Ex. 21.) Cingular denies that it provides such services in either city, but admits that its affiliates do. (Doc. 146 ¶ 13.)

It is also clear that the Defendants have not paid all of the taxes that, according to Plaintiffs, are due under the gross receipts ordinances. Cingular admits that it has never paid gross receipts taxes to either city. (Doc. 146 ¶¶ 18, 20.) Nextel paid Jefferson City gross receipts taxes for the period of December 1999 through September 2000 and has never paid gross receipts taxes to Springfield. (Doc. 146 ¶¶ 27, 29.) Alltel claims that it

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1. Because the Court finds that "Commercial Mobile Radio Services" are mobile telephones, the Court will generally refer to these devices as mobile telephones, except when discussing the record where the Defendants refer to these devices as Commercial Mobile Radios.

does not have sufficient personal knowledge about whether it has paid gross receipts taxes relating to its mobile telephone services in Springfield. (Doc. 146 ¶ 38.)

II. Plaintiffs' Motion for Partial Summary Judgment

Despite the voluminous briefing in this case, the primary issue to be resolved is relatively simple. Are the Defendants in the business of providing telephone services in the two Cities? If they are, then the Cities' ordinances require them to pay a gross receipts tax.

A. Do the Defendants Supply Telephone Services?

Defendants claim that the Cities' charters and tax ordinances do not apply to them because they provide Commercial Mobile Radio Services and the Cities' charters and ordinances refer to telephone services.

In support of that claim, the Defendants devote much attention to discussing legislative history. For example, the Defendants point out that Springfield's gross receipts tax ordinance was amended in July 2000 to include taxation for telecommunications services. Similarly, Jefferson City enacted a telecommunication tax ordinance in 1979 to supercede a prior ordinance that taxed only telephone services. The Defendants urge the Court to conclude that this legislative history amounts to an admission on the part of the Cities that telephone services are not the same thing as telecommunications services.

Plaintiffs, however, have now conceded that they are not seeking to impose the gross receipts tax on all of the Defendants' telecommunication business. Rather, Plaintiffs have limited their current claim to gross receipts tax on the mobile telephone component of Defendants' business. Therefore, the fact that the Cities attempted to broaden the coverage of their ordinances to cover telecommunication services is irrelevant. The charters and ordinances of the Cities included a gross receipts tax on telephone services for decades before the telecommunication amendment, and the Cities are now seeking payment only for "telephone services," not such things as pagers, internet access or "walkie talkies."

Even though the Cities have now limited their claim to telephone services, Defendants persist, arguing that the phrase "telephone services" is ambiguous and, therefore, extrinsic evidence, including legislative history, is still needed. For example, Defendants seek to depose city representatives to find out whether the term "telecommunications" was intended to cover mobile telephone services. If so, Defendants argue that this is evidence that the original ordinance covering telephone services could not have been intended to cover the new wireless technology.

Because the Court finds that the Cities' charters and ordinances are unambiguous, legislative history and extrinsic evidence will not be considered. *See State ex rel. Maryland Heights Fire Protection Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo.1987) (en banc)

("It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature.") (citations omitted); *State ex rel. Bell v. Phillips Petroleum Co.*, 349 Mo. 360, 160 S.W.2d 764, 769 (Mo.1942) ("If [the statute] is clear and unambiguous, it must be construed in accordance with its manifest intent and we may not search for a meaning beyond the statute itself."). *See Cook v. Newman*, 142 S.W.3d 880, 887 (Mo.Ct.App.2004) (en banc) ("Only when a statute's language is ambiguous or uncertain or if its plain meaning would lead to an illogical result will extrinsic matters, such as the statute's history, surrounding circumstances and objectives to be accomplished through the statute, be considered.") (citing *Riordan v. Clark*, 67 S.W.3d 610, 613 (Mo.Ct.App.2001)).

When, as in this case, the legislative body has not defined a term or phrase at issue, the Court is required to give the words their usual and ordinary meaning. *State v. Harris*, 156 S.W.3d 817, 822 (Mo.Ct.App.2005). In interpreting a statute enacted a number of years ago, it is appropriate to consider how words and phrases were defined around the time of the statute's enaction. *See United States v. Lachman*, 387 F.3d 42, 51 n. 11 (1st Cir.2004) (citing *Lamar v. United States*, 241 U.S. 103, 113, 36 S.Ct. 535, 60 L.Ed. 912 (1916)). Accordingly, the Court has consulted a number of older dictionary definitions of the word "telephone."

Appendix G

Most of the dictionaries define "telephone" quite broadly. For instance, the 1969 American Heritage Dictionary states that a "telephone" is "[a]n instrument that directly modulates carrier waves with voice or other acoustic source signals to be transmitted to remote locations and that directly reconverts received waves into audible signals; especially, such an instrument connected to others by wire." The general definition does not require that the instrument be connected to others by wire, but gives wired services as one example, suggesting that other technologies were contemplated. The American Heritage Dictionary retained the same definition in its 1982 publication. Similarly, the 1966 Webster's Third New International Dictionary—the very dictionary that the Defendants in oral argument stated is "the dictionary of choice . . . for the Missouri Supreme Court" (Tr. at 34)—defines the word as "an instrument for reproducing sounds esp. articulate speech at a distance."[2] Taken together, these definitions reveal that being connected to a wire is not an essential characteristic of a telephone, even if it is a common one. CMRS-which converts an acoustic source into a signal for transmission to remote locations—falls squarely within these definitions.

Even today, dictionaries continue to define telephone in substantially the same way it was done at the time

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2. The Defendants correctly pointed out during oral argument that the dictionary provides two examples of telephones, both of which include wires. However, the dictionary's explanatory notes indicate that such examples are not meant to be exhaustive. *Id.*, explanatory note 12.2.2.

the charters and the ordinances were enacted. For example, the Fourth Edition of the American Heritage Dictionary, published in 2000, defines "telephone" as "[a]n instrument that converts voice and other sound signals into a form that can be transmitted to remote locations and that receives and reconverts waves into sound signals." (Fourth Edition, 2000). The Court has also consulted what is perhaps the best indicator of common usage available: Google.com.[3] A Google search of over eight billion web pages yields over 200,000 results for the phrase "wireless telephone," 480,000 results for "cordless telephone," 680,000 results for "cellular telephone," and 700,000 for "mobile telephone." These results confirm that, even in today's age of innovation, a "telephone" need not be connected to wires. People understand that if you put it up to your ear and you speak into a microphone and someone some distance away is able to hear you, you are using a telephone.

In sum, the word "telephone," as it is commonly used, means essentially the same thing as it meant when the Cities' charters and ordinances were adopted. Indeed, usage of the word has not changed much since 1908, when a New York court stated that "[t]he telephone is simply an instrument by which two persons may talk directly to each other." *Gilpin v. Savage*, 60

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3. Google is a comprehensive online index of over eight billion web pages. Google's index, which is updated constantly, includes pages created by individuals, organizations, businesses, and governmental entities. It is, therefore, particularly well-suited to discerning common usage of nearly any term.

Misc. 605, 112 N.Y.S. 802, 805 (N.Y.Sup.1908), *rev'd on other grounds*, 201 N.Y. 167, 94 N.E. 656 (N.Y.1911). Furthermore, the court's conclusion is consistent with other courts which have considered the same or analogous issues. *See City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 59 (Mo.Ct.App.1999); *Airtouch Communications, Inc. v. Dep't of Revenue, State of Wyoming*, 76 P.3d 342, 349-51 (Wyo.2003); *Southwestern Bell Mobile Systems, Inc. v. Arkansas Public Service Commission*, 73 Ark.App. 222, 40 S.W.3d 838, 843 (Ark.Ct.App.2001); *City of Lebanon Junction v. Cellco Partnership*, 80 S.W.3d 761 (Ky.Ct.App.2001); *Campanelli v. AT & T Wireless Services, Inc.*, 85 Ohio St.3d 103, 706 N.E.2d 1267 (Ohio 1999); *Central Kentucky Cellular Telephone Co. v. Commonwealth of Kentucky, Revenue Cabinet*, 897 S.W.2d 601, 603 (Ky.Ct.App.1995). *City of Sunset Hills* is particularly important given this Court's obligation to follow the law of the State of Missouri. The Missouri court, in *City of Sunset Hills*, clearly believed, as does this Court, that a Commercial Mobile Radio Service is a telephone.

This is not to say that telephone technology has not progressed since the Cities' charters and ordinances were adopted. To the contrary, many significant advancements have occurred. The rotary dialing system has given way to tone dialing. Satellite technology enables customers to place calls to other continents, while cordless technology enables them to do so from their backyards. And twisted copper telephone wires are being replaced with fiber optics. Each of these new

technologies could be described in technical terms that may sound quite unlike our current understanding of telephone services. But that does not change the fact that these technologies, just like "Commercial Mobile Radio Services," are created by "telephone" companies to provide what we all think of as "telephone services."

If the Defendants' approach were adopted, then each time that a new technology were incorporated into an existing service or product, the ordinances and charters of each city would have to be changed or no taxes could be collected. At some point on the spectrum, innovation might be so extreme as to alter the very function of the disputed product or service. The mobile telephone, however, is the functional equivalent of land line based telephones, which have existed for more than a hundred years. Thus, the term "telephone" in the Cities' charters and ordinances is generic enough to encompass the Defendants' "Commercial Mobile Radio Services."

B. Whether the Defendants Furnish Services "Within the City"

Both ordinances specify that the gross receipts tax is limited to telephone services "within the city." Springfield's ordinance imposes a tax on "[e]very person engaged in the business of supplying . . . telecommunications and telephonic service, and telecommunications services, within the city." Springfield Code § 70-452 (2000) (recodified June 2, 2003) (Def.Ex. 5). Similarly, Jefferson City's ordinance imposes a tax

on "[e]very person, firm or corporation engaged in the business of . . . furnishing telephone service, telecommunication services . . . in the City of Jefferson [and] who shall furnish the services within the City." Jefferson City Ordinance No. 9485 (1980) (Def.Ex. 22).

The record indicates that the Defendants provide some mobile telephone services within one or both Cities. Defendant Nextel admits that it provides CMRS in Jefferson City and Springfield. (Def. Response to Pl. Statement of Facts [Doc. 146] ¶ 22.) Defendant Alltel's website indicates that the company provides coverage in the Springfield area. (Pl.Ex. 21.) Cingular denies that it provides such services in either city, but admits that its affiliates do. (Doc. 146 ¶ 13.)

Defendants contend, however, that these ordinances are ambiguous in the context of mobile telephone services because it is difficult to determine where the services are provided. Telephone subscribers can travel outside the city's limits and continue to use their mobile phone. A consumer may pass through several cities in the course of a single phone call. In addition, a resident of one city can readily utilize mobile telephone services while located within the boundaries of another city. Specifically, the Defendants argue that mobile telephone services are "inherently mobile and therefore may never occur 'within the city'. . . ." Def. Suggestions in Opposition, p. 46 (emphasis added). This argument is meritless for purposes of the issue of liability. While these phones may be mobile, the service has to occur somewhere, and there is evidence that some of the

Defendants' mobile telephone services occur in Jefferson City or Springfield. Quantifying with precision the location where a call is made or received may be a problem in the damage phase of this dispute. As to liability, however, there is uncontroverted evidence that some of the Defendants' mobile telephone services occur within the limits of Jefferson City or Springfield.

C. Hancock Amendment and the Mobile Telecommunications Sourcing Act

Because the Court has found that the historical tax ordinances of Springfield and Jefferson City have long covered telephone services, and commercial mobile radios are in fact telephones, it is unnecessary to address the Defendants' argument that recent amendments to these ordinances to extend their coverage to telecommunication services violate the Hancock Amendment or the Defendants' argument that the recent amendments to those ordinances were improperly adopted. The Cities' ordinances and charters which tax telephone services predate the Hancock Amendment and Plaintiffs are only seeking to collect taxes for telephone services, not telecommunication services.

The Court also rejects the Defendants' argument that the Cities' ordinances do not comply with the Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116-126. Plaintiffs have not sought to tax Defendants for services provided to non-residents and Plaintiffs are not relying on the Mobile Telecommunications Sourcing Act as its

authority for the gross receipts tax which they seek to collect. Plaintiffs rely on their own charters and ordinances. Again, this issue may be relevant to the amount of taxes which Defendants owe, but the Mobile Telecommunications Sourcing Act did nothing to prevent Plaintiffs from collecting taxes for services provided within their city limits.

D. Is the Gross Receipts Tax a Disguised Sales Tax?

Defendants argue that because Jefferson City's gross receipts tax is based on the price which is paid by Defendants' customers for mobile telephone services, it is in fact a sales tax, not a gross receipts tax. As a sales tax, it is invalid because it was not approved by the voters as required by the City Sales Tax Act. Section 94.510, Revised Statutes of Missouri.

Plaintiffs, as a matter of law, have refuted this argument by showing that the gross receipts tax is applied to more than the revenues derived from mobile telephone services supplied to consumers. For example, some of the Defendants' gross receipts are derived from access charges to other carriers. (Tr. 21.) Such receipts do not constitute sales taxes. Furthermore, although the portion of the gross receipts tax which is based on charges to mobile telephone consumers is reduced by the amount of other taxes paid by those consumers before the gross receipts tax is calculated, *Miller v. City of Springfield*, 750 S.W.2d 118, 120 (Mo.Ct.App.1988), makes it clear that this does not transform a gross receipts tax into a sales tax.

Appendix G

E. Whether the Plaintiffs Complied with Missouri Tax Collection Statutes

The Defendants argue that the Cities failed to comply with various Missouri tax collection statutes, including Mo.Rev.Stat. §§ 136.076, 136.365, 32.053, and 143.903. However, these statutes do not apply to constitutional charter cities. Chapter 136, as its title indicates, applies to "Collection of State Taxes." Chapter 32 applies to the "State Department of Revenue." And Chapter 143 applies to State "Income Tax." None of these statutes contains language suggesting that it applies to constitutional charter cities such as Springfield and Jefferson City, nor have the Defendants cited a case in which any of these statutes were applied to constitutional charter cities. Instead, they directed the Court to *City of Manchester v. Southwestern Bell Telephone*, No. 04-CV-1308, slip op. (E.D.Mo. Apr. 28, 2004), which held that third and fourth class cities are required to collect taxes in the same manner as the State of Missouri. However, Missouri Revised Statute §§ 94.150 and 94.310 (1998), which only apply to third and fourth class cities, specifically provide that those cities are required to follow state tax collection procedures. In contrast, Springfield and Jefferson City, as charter cities, are governed by § 94.310, for purposes of tax collection. In that section, unlike §§ 94 150 and 94.130, there is no requirement that charter cities must collect taxes in the same way as the State. Given the rule of statutory construction, *inclusio unius est exclusio alterius*, the only reasonable interpretation of Missouri State law is that charter cities are not required to follow state tax collection procedures.

Appendix G

F. Whether Springfiled Failed to Follow its Own Ordinances

The Defendants also argue that Springfield is barred from collecting gross receipts taxes in court because Springfield failed to follow the administrative tax collection procedures in its own ordinances. For example, Section 70-152 of the Springfield Code states as follows:

> Whenever the director [of finance] determines that a person has failed to pay a required license fee or tax under this chapter, the director shall notify such person of this determination, which determination shall be an assessment of the license fee or tax which is due and owing, plus all penalties including interest. The notice of the director shall provide that the assessment shall become final ten days after the date that the notice of assessment is mailed by registered or certified mail or delivered to the person or his registered agent, unless such person filed a request in writing with the director requesting a hearing within ten days after the notice is mailed or delivered.

Springfield Code § 70-152 (Def.Ex. 14).

It is undisputed that the Springfield Director of Finance neither sent a notice of assessment to the Defendants nor advised them of their right to a hearing.

It is also undisputed that the Defendants were required by Springfield Code Section 70-454 to provide, by January 15, April 15, July 15 and August 15, of each year, a statement of their gross receipts for the preceding three months. Defendants never complied with this requirement, arguably interfering with Springfield's ability to invoke its administrative procedures by sending out a notice of assessment.

Regardless of who is at fault for the failure of both parties to seek administrative relief, the question remains whether the city is precluded from using the courts to collect these taxes. The Defendants claim that because the Springfield Code specifies only one procedure for collecting gross receipts tax, the Springfield City Council must have intended for the administrative procedures to be the sole remedy. In support of its argument, the Defendants again cite *City of Manchester v. Southwestern Bell Telephone*, No. 04-CV-1308, slip op. (E.D.Mo. Apr. 28, 2004), which suggests that a city could not pursue in court a common law claim for tax collection if an applicable statute or ordinance already provides an adequate remedy. *Also see State ex rel. Hayes v. Snyder*, 139 Mo. 549, 41 S.W. 216, 217 (Mo.1897); *Kansas City v. Field*, 285 Mo. 253, 226 S.W. 27, 32 (Mo.1920); *State ex rel. George v. Dix*, 159 Mo.App. 573, 141 S.W. 445 (Mo.Ct.App.1911).

First, it is not clear to the Court that Springfield's administrative process for tax collection under these circumstances is effective because Defendants have not provided the required statement of their gross

revenues. Even the cases cited by Defendants recognize that the collection procedure established by statute or ordinance must be adequate.

Second, the issue now before the Court is a limited one—whether the Cities' charters provide for the taxation of the Defendants' mobile telephone services. This is a purely legal issue, dependent on the interpretation of codes and statutes and uncontroverted facts. A separate line of Missouri cases, more recent in origin than *Hayes* and its progeny, provide that a purely legal issue can be addressed in court even if administrative procedures are provided. This is because administrative bodies have no special expertise when nonfactual issues are raised. *See Premium Std. Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (1997); *City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107 (Mo.Ct.App.2000). In such situations, there should be no inference that the legislative body intended that all legal issues had to be resolved in the administrative proceeding rather than in court merely because the legislative body created an administrative process to collect taxes. The Court understands that there may be disputed factual issues concerning the amount of taxes owed.

Given the assessment procedures contained in the Springfield ordinances, it is difficult to understand how the Defendants would be prejudiced if Springfield were to forego the administrative process. The procedure sought by the Defendants is a hearing to be held within seven days before a hearing officer selected by the city

manager of Springfield, with no rules of evidence. If the city manager's hearing officer rules in favor of the city, the taxpayers must pay into the city's coffers the taxes due before any appeal of the assessment is permitted.

At this juncture, however, the dispute over the amount of taxes owed is not before the Court. Therefore, the Court need not decide whether Defendants have a right to litigate the amount of taxes owed before an administrative officer appointed by the city manager of Springfield.

III. Springfield's Motion for Summary Judgment as to Sprint's Counterclaim

Sprint has filed a Counterclaim against Springfield seeking a declaratory judgment that Springfield exceeded its authority in enacting its gross receipts ordinance. Springfield has moved for summary judgment as to that Counterclaim. In its response, Sprint raises substantially the same arguments that the other Defendants made in response to the Cities' Motion for Partial Summary Judgment. For the reasons discussed above, the Court rejects these arguments and finds that Springfield's tax ordinances are valid and enforceable against Spring. Accordingly, summary judgment will be granted in Springfield's favor on Sprint's Counterclaim.

IV. Conclusion

Accordingly, it is hereby

ORDERED that the Plaintiffs' Motion for Partial Summary Judgment [Doc. 95] is GRANTED. It is further

ORDERED that Springfield's Motion for Summary Judgment as to Sprint's Counterclaim [Doc. 157] is GRANTED.

s/ NANETTE K. LAUGHREY
NANETTE K. LAUGHREY
United States District Judge

Dated: June 9, 2005
Jefferson City, Missouri

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AUGUST 27, 2008

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 07-2884

City of Jefferson City, Missouri,
City of Springfield, MO,

Appellee

v.

Cingular Wireless, LLC and Southwestern Bell Wireless, LLC,

Appellants

SBC Communications, Inc., et al.,

No: 07-2885

City of Jefferson City, Missouri,
City of Springfield, MO,

Appellee

v.

Cingular Wireless, LLC, et al.,
Alltel Communications, Inc.,

Appellant

Appendix H

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:04-cv-04099-NKL)

ORDER

The petition for rehearing en banc filed by Appellant Alltel Communications is denied. The petition for rehearing en banc filed by Appellants Southwestern Bell Wireless and Cingular Wireless is also denied. The petitions for rehearing by the panel are denied. Judge Gruender did not participate in the consideration or decision of this matter.

August 27, 2008

APPENDIX I — CITY OF SPRINGFIELD SECOND AMENDED COMPLAINT FILED FEBRUARY 7, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

Case No. 04-4099-CV-NKL

CITY OF SPRINGFIELD,

Plaintiff,

vs.

CINGULAR WIRELESS LLC, et al.,

Defendants.

SECOND AMENDED COMPLAINT FOR COLLECTION OF TAX AND OTHER RELIEF[1]

[Table of Contents intentionally omitted]

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1. References to the City of Jefferson and the claims relating thereto, have been deleted because these claims have been dismissed. This Second Amended Complaint is substantially similar to the First Amended Complaint except for the following changes: the addition of a new Count III which seeks a declaratory judgment; a new citation to the proper penalty section of the Code (corrected from the prior Complaint ¶ 30); and ¶¶ 37 & 58 have been updated due to the passage of time.

Appendix I

Claims for Relief

Count I – Collection of Gross Receipts Tax from Defendants Cingular, Nextel, and Alltel

Count II – Collection of Gross Receipts Tax from Defendant SBC

Count III – Declaratory Judgment Pursuant to 28 U.S.C. § 2201 et seq.

Appendix 1

COMES NOW Plaintiff, and for its Second Amended Complaint, states as follows:

I. Preliminary Statement

1. Plaintiff, City of Springfield, has a "gross receipts" ordinance which requires that enumerated entities doing business within the City pay a percentage of their gross revenue as a license tax. The City specifically includes "telecommunication" companies and services within the scope of the ordinances.

2. For years, certain phone companies, including the largest wireless phone carriers, have refused to pay the gross receipts tax, which is paid by other entities doing business in the City of Springfield, including smaller wireless telecommunications companies. For example, Missouri Telecom, Inc., pays the City of Springfield gross receipts taxes on a quarterly basis. Amazingly, some companies, like Sprint Spectrum, L.P., d/b/a Sprint PCS, pay one city but not the other for revenues from wireless services.

3. The wireless telecommunications business is expanding at an exponential rate. The top five (5) wireless companies, including several of the defendants herein, gross revenues in the tens of billions of dollars each year. Defendants realize this revenue because they own, control, or use licenses issued by the FCC, enabling them (or their parents and/or affiliates) to engage in the telecommunications business.

4. Defendants recognize, as they must, that they engage in "local telephone service" because they collect and remit federal excise taxes applicable to local and toll telephone service pursuant to 26 U.S.C. § 4251. Similarly, Defendants pay state sales tax because they provide "telecommunication service" within the meaning of state sales tax law. Mo. Rev. Stat. §§ 144.010(13); 144.020.1(4); 12 CSR 10-3.188(1)(D), (10), and (11).

5. There is no mandatory "pass-on" of a city's gross receipts taxes to consumers, especially where the taxes are past due, as they are here. Indeed, with respect to Defendant SBC in particular, revenues it receives from other carriers for the access charges it collects within the City of Springfield would not be appropriately "passed on" to consumers. If passed on at all, these charges should be assessed to other carriers.

II. Parties

A. *Plaintiff*

6. Plaintiff City of Springfield, Missouri ("Springfield"), is a lawfully existing Missouri municipal corporation and constitutional charter city within the meaning of Article VI, § 19 of the Constitution of Missouri, § 82.010 Mo. Rev. Stat., and all other applicable laws, and has been since March 17, 1953.

7. Springfield is located within Greene County, Missouri.

8. Plaintiff City of Springfield is at times hereafter referred to as the "City."

B. *Defendants*

9. Defendant Cingular Wireless, LLC ("Cingular") is an active Delaware limited liability company in good standing. Cingular's principal place of business is Atlanta, Georgia. Cingular is owned by Defendant SBC Communications, Inc., who owns 60% of Cingular.

10. Southwestern Bell Wireless, LLC, a licensee of Cingular, is an active Delaware limited liability company in good standing. Southwestern Bell Wireless, LLC's principal place of business is Atlanta, Georgia. In addition, all other members of Southwestern Bell Wireless, LLC, are diverse. Unless otherwise specified, all references herein to "Cingular" are inclusive of Southwestern Bell Wireless, LLC.

11. Defendant Nextel West Corp. ("Nextel") is an active Delaware corporation in good standing. Nextel's principal place of business is Farmington Hills, Michigan. Nextel is a wholly-owned subsidiary of Nextel Communications, Inc., as more fully described below. Nextel Communications, Inc., has represented in this litigation that the proper defendant in this matter is Nextel West Corp.

12. Defendant SBC Communications, Inc. ("SBC") is an active Delaware corporation in good standing. Defendant SBC's principal place of business is San Antonio, Texas.

13. Defendant Southwestern Bell Telephone, L.P., is a Texas limited partnership with its principal place of business in San Antonio, Texas. Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, is the SBC telephone company that serves Missouri. Unless otherwise indicated in the text below, Defendant SBC and SBC Missouri will be collectively referred to as SBC, as at least one federal district court has recognized "that SBC and its subsidiaries operate as one large company not separate entities."

14. Defendant Alltel Communications, Inc. ("Alltel"), is an active Delaware corporation in good standing. Alltel's principal place of business is Little Rock, Arkansas. Alltel is a wholly-owned subsidiary of Alltel Corporation. Alltel Corporation has stipulated that Alltel Communications, Inc., is the proper defendant and has agreed that Alltel Corporation will guarantee the judgment, if any, and abide by declaratory relief, if any, in this case.

15. Counter-claimant Sprint Corporation is a Kansas corporation with its principal place of business in Overland Park, Kansas. According to the representations of Sprint's counsel and the interrogatory answers verified by Mark Beshears, Sprint Corporation's Assistant Vice President of State and Local Taxation, Sprint Corporation "does not control the operational decisions and activities of Sprint Spectrum, L.P., Sprint United Management Company, or Sprint Communications Co., L.P.," who have each paid some gross receipts taxes to both Plaintiffs. Because

Sprint Spectrum, L.P., is comprised of various partners, including a Missouri partnership, diversity jurisdiction as to Sprint Spectrum, L.P., would not exist and claims must be pursued in state court.

III. Jurisdiction and Venue

16. Jurisdiction is proper in this Court based upon 28 U.S.C. § 1331, diversity jurisdiction. Plaintiff is a city within the State of Missouri and the named defendants herein are incorporated in Delaware, and have their principal places of business outside the State of Missouri.

17. Plaintiff and Defendants are, therefore, diverse, and the amount in controversy exceeds $75,000.

18. Venue is proper in the Western District of Missouri. Plaintiff is located in the Western District of Missouri and the taxes are owed in this District.

19. The Tax Injunction Act is not a bar to jurisdiction for the reasons described by the United States Supreme Court in *Jefferson County v. Acker*, 527 U.S. 423 (1999).

20. These Defendants have consistently taken the position in litigation brought by other municipal entities that the claims relating to gross receipts ordinances should be heard in Federal Court.

Appendix I

IV. BACKGROUND

A. *Local Governments Impose Diferent Taxes and Fees for Diferent Purposes*

21. At the outset, it is critical to note the distinction between franchise fees, which are paid as "rent" for the use of public right of ways, and license taxes which are imposed upon certain types of businesses identified in the statute or resulting ordinance, such as warehousemen, gas companies, and telephone companies.

24. A license (or "privilege" or "occupation") tax is distinct from and not inconsistent with those fees commonly known as "franchise fees," assessed by cities against utilities.

25. Missouri Revised Statute § 94.110, *et. seq.*, empowers cities of various classes to tax telephone companies.

26. Springfield is a charter city empowered to tax gross receipts by the Missouri Constitution, Missouri Statute § 82.010 and its charter, which provides in pertinent part:

> (1) *Assessment, levy and collection of taxes.* Assess, levy and collect taxes for all general and special purposes, subjects or objects of taxation not expressly prohibited by laws, provided for enforcing the prompt payment

and penalties for delinquency thereof, and adopt such classifications of the subjects and objects of taxation as contrary to law. . . .

(22) *Regulation of businesses generally.* License, tax, regulate or suppress all businesses, occupations professions, vocations, activities (set forth and enumerated by the statutes of this state, now or hereafter applicable to cities of the first, second, third or fourth class or of any population group) which any such cities are now permitted or may hereafter be permitted to license, tax, regulate, or suppress.

(23) *License taxes generally.* To impose a license tax upon any business, vocation, pursuit, calling, animal or thing.
[Section 2.16. *Enumeration of certain powers.*]

License taxes and regulations may be imposed by ordinance upon all lawful objects of taxation, including, but not limited to the following: (3) And upon telegraph companies; telephone companies; . . . .
[Section 18.1. Occupations]

27. Plaintiff's ordinance is specifically authorized by Mo. Rev. Stat. Section 71.610 which provides that municipal corporations may impose a license tax where the business to be taxed is specifically identified in the charter of the cities.

Appendix I

B. *The Gross Receipts Taxes at Issue*

28. In Missouri, a telecommunications corporation in the business of providing telecommunications antennae is a "telephone company" within the meaning of the enabling legislation, Mo. Rev. Stat. § 71.610, allowing a city to tax the telephone company pursuant to Mo. Rev. Stat. § 94.110. Similarly, Defendants who sell wireless telephone services are "telecommunication" companies and offer "telecommunication services" within the meaning of the enabling legislation and ordinance.

29. Springfield's gross receipts ordinance, denominated as a License tax for Telephone Companies, provides as follows:

> Every person engaged in the business of supplying **telephones,** and **telecommunications** and **telephonic service, and telecommunications services,** within the city shall pay as a license tax a sum equal to six percent of the gross receipts from such business.
> (G.O. 1047, Section 2 and G.O. 1762, 1/01/68; recodified 6/02/03 pursuant to Mo. Rev. Stat. § 71.943)

30. Springfield's ordinances also provide for fines and penalties pursuant to Section 70-457 which states:

> *Penalty for failure to pay tax.* Any person required to be licensed by this article who shall

> fail to file a quarterly report as required by this article or who shall willfully fail or refuse to pay the license tax when due shall, for such failure, for the first 30 days or any part thereof, pay, in addition to such license tax, a penalty of ten percent of the gross tax due and unpaid, and for such refusal of each succeeding 30 days or any part thereof shall pay, as a penalty, three percent of such tax due, so long as such tax shall remain unpaid. Such penalty shall be in addition to any penalty imposed under section 1-7.

31. Plaintiff was authorized and empowered to enact the ordinance described above at the time it was enacted.

32. Plaintiff's ordinance is not an effort to regulate or prohibit entry of Defendants into the market.

33. Plaintiff's ordinance is not an effort to regulate rates Defendants charge their customers.

34. The terms of Plaintiff's ordinance makes clear that Defendants are not expected to pay their tax until after they have entered the market, conducted business, and earned money within the City.

35. In Missouri, gross receipts taxes are paid on all revenues received from the business operation regardless of the type of receipt unless the City's ordinances specify otherwise.

36. Plaintiff has informed Defendants of its gross receipts ordinance and has demanded compliance therewith.

37. Defendants have failed and refused pay the required license taxes at all times during the preceding five (5) years and at all other times relevant to this action except that: (a) Sprint Communications Co., L.P., has paid Springfield at one point in 2004; (b)SBC has paid some taxes to Springfield, but not on all revenue streams; (c) Nextel and Alltel have made very recent payments, without waiving their positions in this litigation.

38. In all respects, Defendants owe Plaintiff license taxes, interest, and penalties for said period.

39. Plaintiff's gross receipts ordinance is distinct from and unrelated to its ability to enter into franchises with utilities and Plaintiff makes no claim for franchise fees at this time or in this suit.

C. *Defendants' Gross Receipts in Plaintif's City*

Cingular Wireless, LLC

40. Cingular Wireless, LLC, formerly known as Southwestern Bell Wireless, is the second largest provider of wireless voice and data communication services in the United States. In its Answer to the Complaint in this matter, Cingular Wireless, LLC, admits that it provides commercial mobile radio service in the United States. (Doc. 26, ¶ 42.)

41. In 2002, Cingular reported revenues of $14.9 billion dollars and in 2003, it reported revenues of $15.5 billion dollars.

42. To its shareholders, Cingular describes itself as, "one of the largest digital wireless network operators in the United States, we have access to licenses, either through our own licenses or licenses owned by joint ventures and affiliates, to provide cellular or PCS wireless communication services covering 236 million [people] or approximately 81% of the U.S. population, including in 45 of the 50 largest U.S. metropolitan areas. [Cingular] directly provides cellular or PCS services in 43 of the 50 largest U.S. metropolitan areas . . . serve(s) customers in the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, as of December 31, 2003."

43. Cingular describes its voice services, as, including *inter alia*, "in addition to basic wireless, voice **telephony** services, we offer many enhanced features with many of our pricing plans. These features include caller i.d., call waiting, call forwarding, three-way calling, no answer/busy transfer and voice mail."

44. On February 17, 2004, Cingular entered into an Agreement and Plan of Merger to acquire AT&T Wireless Services, Inc., for $41 billion dollars. Certain regulatory approvals are required, and the merger, if consummated, will occur at the end of the year. AT&T Wireless Services, Inc., also does business within the City of Springfield.

Appendix I

45. According to the Springfield Business Journal, Cingular is one of the largest wireless communication dealers in the City and has been doing business in the City since at least the year 2000.

46. According to the City of Springfield records, Cingular has never paid gross receipt taxes to the City of Springfield.

Nextel

47. Nextel West Corp. is a wholly-owned, second tier subsidiary of Nextel Communications, Inc. ("NCI"). NCI describes itself as, "the leading provider of wireless communication services in the United States." NCI also states that, through its subsidiaries, it "provides a comprehensive suite of advanced wireless services that include: digital wireless mobile **telephone** service; Nextel Nationwide Direct Connect Walkie Talkie Service; and a number of wireless data applications, including e-mail, mobile messaging and Nextel on-line services. . . ."

48. In 2003, NCI reported $10.8 billion dollars in revenues, $1.47 billion dollars in income, and stated that it provided service to "about 12.9 million subscribers."

49. Nextel conducts business in Springfield.

Appendix I

SBC

50. SBC describes itself as a holding company and as "one of the largest providers of **telecommunication services** in the U.S. and the world." SBC states in its SEC filings that its subsidiaries provide telecommunication services in 13 states, including Missouri.

51. Southwestern Bell Telephone, L.P., d/b/a SBC Missouri is the SBC telephone company that provides local telephone service in the City of Springfield.

52. SBC provides local land line service in the City of Springfield.

53. SBC has paid some gross receipts taxes to the City of Springfield, but these amounts have been steadily declining in the past five (5) years, notwithstanding that Springfield is a growing metropolitan area.

54. SBC has indicated to Springfield that although it recognizes that it must pay gross receipts taxes on some of its revenue streams arising from its landline business, it simply will not pay gross receipts tax on certain other revenue streams, including the access charges that it charges other carriers.

Appendix I

Alltel

55. Alltel Corporation, the parent of Alltel Communications, Inc., describes itself as a "customer focused communication company, providing wireless and other **phone,** internet and data services to 12 million residences and business in 26 states."

56. According to its 10K, filed with the Securities Exchange Commission, Alltel Corporation invested $1.1 billion dollars in its **telecommunications** network in order to increase voice capacity and provide customers with access to high speed wireless and wireline services. Presumably, a portion of this investment enables Defendant Alltel to operate (and expand) its telecommunications business in Springfield.

57. Alltel Corporation booked $7.1 billion dollars in revenue in 2003 and its wireless operations accounted for $4.4 billion dollars, realizing income in excess of $1 billion dollars.

58. Alltel is the single largest wireless carrier in Springfield, according to the Springfield Business Journal, and has 150 full-time local employees.

Appendix I

D. *Federal Law Does Not Preempt the Enforcement of This Taxation*

i. *Section 601 of the FCA protects the power of local governments to tax.*

59. In other litigation relating to franchise fees and gross receipts ordinances, these Defendants have attempted to argue that all taxation at a local level is preempted by the Federal Communications Act of 1934 ("FCA") or the Federal Telecommunication Act of 1996 ("FTA"), which amended, in part, the provisions of the FCA.

60. These federal laws were enacted for their own specific purposes and specifically "save," as more fully described below, the power of state and local governments to tax telecommunications businesses operating within their territorial limits.

61. The FTA was enacted in order to prohibit discrimination, at a local level, between telecommunication companies with respect to right of way usage. In other words, cities are generally empowered to charge "rent" to utilities who use the city streets and rights of way, as described above. Section 253, described below, requires that this rent be charged in a fair and non-discriminatory way.

62. The Mobile Telecommunications Sourcing Act ("MTSA"), 4 USC §§ 116 *et. seq.*, was passed after the wireless telecommunications industry sought

development of a taxing system that would simplify tax administration for the carriers in the states and localities in which they do business. The MTSA, therefore, plainly does not prohibit state or local taxation.

63. In keeping with the MTSA, the Missouri legislature requires local taxing authorities to comply with the MTSA. Mo Rev. Stat. § 332.087.12.

64. In Missouri, the Court of Appeals for the Eastern District has concluded that the imposition of a local license tax on a telecommunications company is not a per se violation of the FTA.

65. Section 601(c) of the FTA, which describes the background and effects of the amendments adopted in 1996, provides as follows:

> (2) State tax savings provision. —
>
> Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation. . . .
>
> See, Pub. L., 104-104, Section 601, reprinted as a note to 47 U.S.C. § 152.

ii. *Section 253 of the FTA preempts only unreasonable and discriminatory franchise fee.*

72. Section 253 of the FTA provides as follows:

> "no state or local statute or regulation. . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. . . ."

73. Thus, Section 253 of the FTA cannot and does not prohibit the imposition of taxes that are due only after a business has conducted its operation and realized gross revenues.

iii. *Section 332(c)(3)(A) of the FCA does not prohibit taxes in licensees.*

74. Section 332(c)(3)(A) of the FCA provides as follows:

> [N]o state or local government shall have any authority to regulate the entry of or the rates charged by any [CMRS provider], except that this paragraph shall not prohibit a State from regulating other terms and conditions of commercial mobile services.

75. When Congress passed the above referenced section as part of the Omnibus Budget Reconciliation Act of 1993, the conference report provided the following legislative intent:

> The Conferees agree to drop the language contained in both the House bill and the Senate amendment relating to State and local government tax treatment of licenses under the Communications Act. **It is the intent of the Conferees to clarify that nothing in this Act alters or affects the authority or lack of authority of state and local governments to assess ad valorem property or other taxes on the licensee.**
>
> H.R. Conf. Rep. No. 103-213, reprinted in US Cong. Ad. News, 993 at 1175 (emphasis added).

E. *Defendants Have Taken Advantage of the Complicated FCA and Failed to Remit Taxes that are Due and Owing*

i. *Some cellular telephone companies pay their taxes as they should.*

76. Springfield has received gross receipts remittances from several telecommunications companies, including Sprint on one occasion.

ii. *Demand has been made on Defendants.*

78. Defendants have been approached several times by Plaintiff about paying the gross receipts tax and have had opportunities to pay these taxes under protest.

79. Most recently, by letter dated April 14, 2004, counsel for Plaintiff sent demand letters, return receipt requested.

80. To date, Defendants have not complied with Plaintiff's requests for the remittance of all gross receipts taxes due and owing or an audit relation to the same.

iii. *Wireless telecommunications companies must pay taxes like every other company doing business in the City.*

81. There is nothing unique about license taxes.

82. License taxes have been part of the Missouri state and local government revenue services for decades and constitute a large part of each jurisdiction's revenue and budget.

83. Springfield has had its tax in place since 1946.

84. Telecommunications companies are not exempt from paying license taxes imposed by the City under the broad authority entrusted to these local governments by the Missouri legislature and the federal government.

85. Exempting wireless revenues or other revenue streams which telecommunications companies unilaterally decide are not the basis of license taxes would frustrate the purposes of federal, state, and local law and would lead to alleged equal protection violations. Moreover, accepting gross receipts from those telecommunications companies who pay as they should without collecting from the large companies who refuse creates the uneven playing field Congress sought to avoid by way of the FCA/FTA.

COUNT I

Collection of Gross Receipts Tax from Defendants Cingular, Nextel, and Alltel

86. Plaintiff, City of Springfield, incorporates by reference as though fully set forth herein, each of the allegations set out above.

87. Defendants Cingular, Nextel, and Alltel, have failed to remit taxes due and owing the City of Springfield for the past five (5) years and continuing.

88. Plaintiff seeks these unpaid back taxes plus penalties and fines, as appropriate.

WHEREFORE, Plaintiff City of Springfield respectfully requests that the Court enter judgment in favor of the City, award pre-judgment interest, fines, penalties, attorneys fees, and any other relief deemed just and proper.

Appendix I

COUNT II

Collection of Gross Receipts Tax from Defendant SBC

89. Plaintiff, City of Springfield, incorporates by reference as though fully set forth herein, each of the allegations set out above.

90. Defendant SBC has paid some monies as gross receipts taxes, but has failed to remit all of the gross receipts taxes due and owing the City of Springfield for the past five (5) years and continuing to present and has failed to allow an inspection of books and records relating to the same.

91. Plaintiff seeks these unpaid back taxes and penalties and fines as appropriate.

WHEREFORE, Plaintiff City of Springfield respectfully requests that the Court enter judgment in favor of the City, award pre-judgment interest, fines, penalties, attorneys fees, and any other relief deemed just and proper.

Appendix I

COUNT III

(City of Springfield v. Nextel, Alltel & Cingular)

Declaratory Judgment Pursuant to Fed. R. Civ. Proc. 57 and 28 U.S.C. § 2201 et seq.

74. Plaintiff City of Springfield, incorporates by reference as though fully set forth herein, each of the allegations set forth above, including allegations relating to the diversity jurisdiction of this Court.

75. Springfield made numerous demands on Nextel, Alltel and Cingular, (the "Wireless Defendants") to timely pay their gross receipts tax.

76. The Wireless Defendants refused to pay the gross receipts tax and contend, *inter alia*, they provide "Commercial Mobile Radio Service" which they further contend, to this day, is not a subject within the scope of the Plaintiff's Ordinance.

77. In addition to disclaiming liability for the tax, the Wireless Defendants subverted the collection processes available to the City by failing to self-report gross receipts throughout the applicable five year time period prior to the filing of this lawsuit, as well as after the filing of this lawsuit, making it impossible for the City Finance Director to send a meaningful assessment letter under the City Code.

78. Not only do the Wireless Defendants challenge the applicability of the Ordinance to their particular "Commercial Mobile Radio Services," they also challenge the City's authority to enact and enforce the Ordinance, and have taken this position to the present time.

79. The Wireless Defendants claim the Ordinance, and its applicability to their services, violates federal statutes, the federal constitution, state statutes, state law and the state constitution as more fully set out in the Affirmative Defenses included in each of the Wireless Defendants' Answers, Doc. Nos. 96, 98, 99 & 110.

80. Each of the Wireless Defendants asserted Counterclaims for Declaratory Judgment under the Hancock Amendment and alleged a justiciable controversy exists between the parties. Doc. Nos. 96, 98, 99 & 110.

81. Exhaustion of administrative remedies is not required in this matter generally, and specifically as to this Count III, because legal issues are presented, exhaustion would be futile, the exhaustion requirement has been waived, the Wireless Defendants dispute the applicability of the tax to their services in the first instance, the Wireless Defendants challenge the authority of the City to even tax them under the Ordinance, and no factual issues (or issues requiring special agency expertise) exist.

82. An actual case and controversy, specifically a justiciable controversy, exists between the City of Springfield and the Wireless Defendants.

83. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 as to the validity and applicability of the Ordinance to the Wireless Defendants' services, including the Court's ruling as to the following legal questions:

a. Declaring the Springfield Ordinance, which includes the terms "telephone" and "telephonic" applies to the Wireless Defendants' services; and

b. Declaring the Wireless Defendants liable to pay taxes under the Ordinance.

84. Plaintiff also requests any and all further relief as the Court may deem proper and just pursuant to 28 U.S.C. § 2202, including monetary damages for unpaid taxes, and penalties and interest.

WHEREFORE, Plaintiff City of Springfield respectfully requests that the Court enter judgment in favor of the City, award declaratory judgment as to the applicability and validity of the Ordinance to Defendants pursuant to 28 U.S.C. § 2201 as described above, and order all other relief deemed just and proper pursuant to 28 U.S.C. § 2202.

Respectfully Submitted,

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